Jurisdictional Statement

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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JAMES A. McCLURE, United States Senator,
Appellant,

v.

RONALD REAGAN
~~JAMES EARL CARTER~~, President of the United States
and ABNER J. MIKVA,
Appellee.

On Appeal from the District Court for the District of Idaho

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the three judge panel in the United States District Court for the District of Idaho correctly held that the plaintiff James A. McClure lacked standing to challenge the appointment of Judge Abner J. Mikva to the United States Court of Appeals for the District of Columbia Circuit on the grounds that said appointment violated Article I, Section 6, Clause 2 of the United States Constitution.

2. Whether the three judge panel correctly held that the plaintiff's claim should be dismissed as nonjusticiable based on the separation of powers doctrine.

PARTIES TO THE CASE

Plaintiff—Senator James A. McClure of Idaho.

Defendants—The President of the United States, Ronald Reagan substituted for former President, James Earl Carter; Abner J. Mikva.

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and ABNER J. MIKVA,
Appellee.

On Appeal from the District Court for the District of Idaho

JURISDICTIONAL STATEMENT

Appellant submits herewith his jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The three judge panel of the United States District Court for the District of Idaho issued its order and decision on May 5, 1981. The decision is reported at 513 F. Supp. 265.

GROUNDS FOR JURISDICTION OF THIS COURT

(i) This is an appeal from a dismissal of an amended complaint for declaratory relief arising out of Article I, Section 6, Clause 2 of the United States Constitution. In

his original complaint, appellant invoked federal jurisdiction pursuant to Title 28 United States Code Sections 1331 and 2201. In his amended complaint, plaintiff also invoked federal jurisdiction pursuant to Section 101(c)(2) of Public Law 96-86, 93 Stat. 656, which provides in pertinent part that:

> (1) Any Member of Congress, whether he voted to confirm or not to confirm the appointment of any judge appointed during the Ninety-Sixth Congress to the United States Court of Appeals for the District of Columbia, or whether he abstained from, or was not present for such vote, may bring a civil action in the United States District Court for the District of Columbia or in any United States District Court in the State he represents to contest the constitutionality of the appointment and continuance in office of said circuit judge on the grounds that such appointment and continuance in office is in violation of Article I, Section 6, Clause 2 of the Constitution;
>
> (2) The designated United States district courts shall have exclusive jurisdiction, without regard to the sum or value of the matter in controversy, to determine the validity of such appointment and continuance in office;
>
> (3) Any action brought under this section shall be heard and determined by a panel of three judges in accordance with the provisions of Section 2284 of Title 28, United States Code. Any appeal from the action of a court convened pursuant to such section shall lie to the Supreme Court; and
>
> (4) Any judge designated to hear any action brought under this section shall cause such action to be in every way expedited.

(ii) The order and decision to be reviewed was entered on May 5, 1981, by a three judge panel of the United States District Court for the District of Idaho.

The Notice of Appeal was filed on June 9, 1981 in the United States District Court for the District of Idaho.

(iii) The statutory provision conferring jurisdiction on this Court is set forth in full above.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(i) Article I, Section 6, Clause 2 United States Constitution:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Article II, Section 2, Clause 2 of the Constitution:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

(ii) Section 101(c)(2), Public Law 96-86, is set forth above.

(iii) Title 28 United States Code Section 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

(iv) 28 United States Code Section 2201:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This case arises out of the appointment of then Congressman Abner J. Mikva to the United States Court of Appeals for the District of Columbia Circuit.

On November 7, 1978, defendant Mikva was elected to the United States House of Representatives for the term commencing on January 3, 1979 and ending on January 3, 1981. On May 29, 1979, former President James E. Carter nominated defendant Mikva to be a circuit judge of the United States Court of Appeals for the District of Columbia. On September 25, 1979 the United States Senate, by majority vote, confirmed the nomination of Abner J. Mikva, and on September 27, 1979 he took the oath of office as a circuit judge.

Under the provisions of Title 28, Section 44(d) of the United States Code, each circuit judge of the United States receives a salary at an annual rate determined under Section 225 of the Federal Salary Act of 1967, 2 U.S.C. §§ 351-361, as adjusted by Section 205(a)(1) of the Executive Salary Cost-of-Living Adjustment Act. 28 U.S.C. § 461. Section 205(a)(1) provides that when an

adjustment in rates of pay in the General Schedule takes effect under the Federal Pay Comparability Act of 1970 5 U.S.C. §§ 5305 *et seq.*, each salary rate subject to adjustment under Section 205(a)(1) shall be adjusted by an amount equal to the percentage of such salary rate which corresponds to the overall average percentage of the adjustments in the rates of pay under such General Schedule.

The Federal Pay Comparability Act requires that the President, after considering the report of his agent and the findings and recommendations of the Advisory Committee on Federal Pay, *annually* adjust the rates of pay of each statutory pay system in accordance with the principle of paying the same rate of pay for the same level of work in private enterprise. The President is further required annually to transmit to Congress a report of the pay adjustment which shall specify the overall percentage of the adjustment in the rates of pay in the General Schedule and of the adjustment of the rates of pay under the other statutory pay systems.

The President may, however, because of economic conditions, adjust rates of pay at a lower percentage than that recommended by the Advisory Committee and submit that alternative plan to Congress. Such an adjustment must be made prior to September 1st. The lower percentage increase becomes payable on the first day of the first applicable pay period commencing on or after October 1 unless before the end of the first period of thirty calendar days of continuous session of Congress after the date on which the alternative plan is submitted, either House adopts a resolution disapproving the alternative plan. If such a resolution is adopted, the President is required to readjust the rates of pay of the statutory pay systems in accordance with the recommendations of the Advisory Committee on Federal Pay, effective as of the beginning of the first pay period commencing on or

after the date the resolution is adopted or on or after October 1, whichever is later.

The President submitted, on August 31, 1979, an alternative pay adjustment plan and increased rates of pay of the general schedule by an overall percentage of seven (7) percent.

Neither House of Congress acted to disapprove the alternative plan proposed by the President before October 1, 1979.

On September 25, 1979 the plaintiff filed a complaint for declaratory judgment and injunctive relief claiming that by virtue of the foregoing laws relating to federal salary increases for circuit judges that the appointment of Abner J. Mikva violated Article I, Section 6, Clause 2 of the Constitution. Plaintiff also filed on September 25, 1979 an application for an order requiring defendants, the President of the United States and J. Stanley Kimmit, Secretary of the United States Senate, to show cause why their actions in effecting the appointment of Abner J. Mikva as circuit judge should not be enjoined. Although the United States District Court for the District of Idaho issued a show cause order, Abner J. Mikva was sworn in as circuit judge before the order was timely served.

Thereafter, on October 12, 1979, Congress passed and the President signed into law Public Law 96-86, 93 Stat. 656 (1979), which contained Section 101(c)(2) authorizing members of Congress to challenge the constitutionality of appointments made to the United States Court of Appeals for the District of Columbia Circuit during the 96th Congress. Plaintiff then filed an amended complaint for declaratory relief on November 6, 1979, naming the President and Abner J. Mikva as defendants and seeking a three judge court to hear his complaint that the appoint-

ment of Abner J. Mikva violated Article I, Section 6, Clause 2 of the United States Constitution.

Plaintiff claimed that the actions required of the President by the federal salary laws are mandatory. In *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), the court held that under the federal salary scheme the President's actions, are mandatory and non-discretionary, *i.e.*, he must, prior to September 1st of each year, adjust the pay scales in accordance with the increase proposed by his pay agent, or pursuant to an alternative plan.

The compensation of a federal judge which "Shall not be diminished during their Continuance in Office (Article III, Section 1, U.S. Constitution) is fixed when Congress declares "what sum shall be received by each judge out of the public funds and the times for payment." *Miles v. Graham*, 268 U.S. 501, 508-509 (1925). Thus, even though the office to which defendant Mikva was appointed did not commence receiving the increased compensation until October 1, 1979, the compensation of the office of circuit judge had been increased as of September 1, 1979, during the term for which defendant Mikva had been elected, thus barring him from that office.

Cross motions for summary judgment were filed by the parties, in which the defendants argued that plaintiff lacked standing, and that even if he did not, that the appointment of Abner J. Mikva did not violate Article I, Section 6, Clause 2 of the Constitution. The plaintiffs argued conversely as described above.

On May 5, 1981 the three judge panel issued its order and decision dismissing the case, holding that plaintiff lacked standing to bring the lawsuit and that the claim was nonjusticiable based on the separation of powers doctrine.

SUBSTANTIAL QUESTIONS ARE PRESENTED WHICH REQUIRE PLENARY CONSIDERATION

The decision of the three judge court in the United States District Court for the District of Idaho presents this Court with substantial federal questions regarding standing and the separation of powers doctrine as they relate to suits by legislators.

The three judge court held that the plaintiff lacked standing either as a private individual or as a member of the United States Senate to bring this action with or without the jurisdictional statute, Section 101(c)(2) of Public Law 96-86, because he did not present to the court a distinct and palpable injury to himself. Therefore, under this Court's holding in *Baker v. Carr*, 369 U.S. 186 (1962), the three judge court decided that Senator McClure did not have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 204.

The three judge court, moreover, concluded that Section 101(c)(2) of Public Law 96-86 was of no assistance to the plaintiff because it implicated "special concerns regarding the separation of powers." *McClure v. Carter*, 513 F. Supp. 265, 268 (D. Idaho 1981). Therefore, the legislative branch, in seeking to grant authority to the judicial branch to decide the constitutional issue, acted improperly because of the separation of powers doctrine. The three judge court reached this conclusion because it decided that "[u]nder the Constitution, it was the duty of Congress itself, in the first instance, to determine Judge Mikva's qualifications both on the merits and on the issue of whether he was constitutionally eligible to serve as a judge." *Id.* at 271.

Plaintiff believes that the three judge court failed to consider the unique injuries he, as a legislator, alleged.

Plaintiff also believes that the three judge court failed to correctly interpret the decisions of this Court regarding the separation of powers doctrine and the duty of the judicial branch to decide constitutional issues.

(i) Standing

Senator McClure alleged the following injuries: (1) To the Senate, and to himself derivatively, because the President, in nominating Judge Mikva, a person not constitutionally eligible for the office of circuit judge, denied the Senate the opportunity to exercise its constitutional duty under the Appointments Clause, Article II, Section 2, Clause 2, to advise and consent to the appointment of a constitutionally qualified nominee. This injury is continuing.

Since the appointment process "contemplates that only such persons as are qualified to hold office shall be nominated. . .", 17 Ops. A.G. 522 (1883), it is implicit in that process that the President must make the threshold determination of a nominee's constitutional eligibility and that the Senate's role is to approve or reject whomever the President forwards for confirmation based solely upon the Senate's view of the nominee's qualifications to be a judge. Thus, when the President nominates a person who is not constitutionally eligible for a judgeship, the Senate is unable to exercise its constitutional duty to advise and consent to the appointment of a constitutionally eligible nominee, and its role is thereby diminished. (2) To the Senate, and to himself derivatively, since the Senate's rights and duties under the Constitution have, and will continue to be, diminished because its acts are being, and will continue to be, interpreted and possibly held unconstitutional by an unqualified person; (3) To the Senate, and himself derivatively, since an appointment prohibited by Article I, Section 6, Clause 2 suggests the presence of the very collusion the

constitutional provision was designed to prevent; and (4) To himself, as an individual United States Senator, since he was forced to cast his vote against defendant Mikva to prevent an unconstitutional appointment, thus nullifying his constitutional right to advise and consent to the appointment of a nominee based solely on the nominee's qualifications to perform judicial functions.

This Court's past decisions on standing demonstrate clearly that "[i]n terms of Article III limitations on court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83,101 (1968). A plaintiff must allege injury in fact to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 152-153 (1970). The injuries may be a "specific present objective harm or a threat of future specific harm." *Laird v. Tatum*, 408 U.S. 1, 14 (1972). A third requirement for standing is that the plaintiff prove the injury was caused by the defendant's actions or in the alternative that prospective relief would remove the harm. *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

The unique issue of standing for congressional plaintiffs has been treated most frequently by the United States Court of Appeals for the District of Columbia Circuit. That circuit's most recent decision in *Riegle v. Federal Open Market Committee, et al.*, No. 80-1061 (D.C. Cir., filed June 24, 1981) App. at 17a and its past decisions involving congressional plaintiffs leave this crucial issue unsettled and makes its resolution particularly appropriate for this Court. In the *Riegle* case, Senator Riegle challenged the constitutionality of the proce-

dures established by the Federal Reserve Act for the appointment of the five Reserve Bank members of the Federal Open Market Committee who were appointed but not, pursuant to those procedures, subject to the advice and consent of the Senate. Rather, the five members whose appointments were challenged by Senator Riegle were appointed subject to the approval of the Board of Governors of the Federal Reserve System. The district court dismissed the complaint for lack of standing. The Court of Appeals, however, decided that Senator Riegle had standing to make the challenge, but dismissed the case on the grounds of the equitable discretion of the court to avoid decisions which involve separation of powers considerations.

In finding standing for Senator Riegle the court stated that ". . . assuming that the five Reserve Bank members of the FOMC are officers who must be appointed with the advice and consent of the Senate, Riegle's inability to exercise his right under the Appointments Clause of the Constitution is an injury sufficiently personal to constitute an injury in fact." App. at 27a. Senator Riegle, however, had inappropriately named the five members of the Open Market Committee as defendants since their actions had not caused the injuries alleged; rather, it was the directors of the Federal Reserve Banks who had appointed the five defendants who were the cause of the injury. Even so, the court held that the causation requirement of standing was satisfied because the prospective judicial relief would remove the harm. Finally, the court held that the interest claimed by Senator Riegle to be injured, that is, his right to advise and consent to the appointment of officers of the executive branch, was within the zone of interests protected by Article II, Section 2, Clause 2, the Appointments Clause.

Earlier decisions of the District of Columbia Circuit reflect the unsettled nature of the standing issue regard-

ing congressional plaintiffs. Two principles appear to dominate the congressional plaintiff standing cases preceding the *Riegle* decision; first, that the requirements of standing apply equally to congressional plaintiffs and private plaintiffs, and second, that a congressional plaintiff must suffer an injury that his legislative colleagues cannot redress.[1] These two principles have led the District of Columbia Circuit to make inconsistent application of the standing principles. In the *Riegle* case, the court recognized this by stating:

> For example, in *Public Citizen v. Sampson*, 379 F. Supp. 662 (D.D.C. 1974), *aff'd mem.*, 169 U.S. App. D.C. 301, 515 F.2d 1018 (1975), *Harrington v. Bush*, *supra* at 212-214, and *Reuss v. Balles*, *supra* at 468, standing was withheld from congressional plaintiffs in part because their power to vote, *i.e.*, to enact legislation to cure the alleged injury, remained unimpaired. Yet in *Kennedy v. Sampson*, *supra*, the court conferred standing on Senator Kennedy to challenge the legality of an attempted pocket veto of a bill for which he had voted. We reasoned that executive impairment of the Senator's past vote had nullified Kennedy's legislative power. *Id.* at 436. The Senator had, however, collegial remedies comparable to those which negated standing in the *Public Citizen*, *Harrington*, and *Reuss* cases; Senator Kennedy's power to reintroduce the relevant legislation in the next session of Congress and to vote thereon remained unimpaired. In *Goldwater v. Carter*, *supra*, this court's most recent opinion regarding congressional standing, legislator plaintiffs were again granted standing despite the presence of adequate collegial remedies. App. at 29a.

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[1] Former Chief Judge Carl McGowan, United States Court of Appeals for the District of Columbia Circuit fully described the case histories of Congressional-plaintiffs in *Congressmen in Court: The New Plaintiffs*, 15 Georgia Law Review 241.

Using the traditional standing tests provided by this Court plaintiff submits that he has satisfied those tests and has standing to challenge the appointment of defendant Mikva. Plaintiff has alleged injuries to interests protected by the Constitution which are most certainly capable of redress by the judiciary.

In addition, the language of Section 101(c)(2) of Public Law 96-86 is a recognition by both the executive and legislative branches of their apprehension that the appointment of Mr. Mikva is constitutionally infirm and that it is the responsibility of the judicial branch to make the final determination of that matter. In particular, the language of subparagraph 1, Section 101(c), recognizes under the particular facts of defendant Mikva's appointment that both the Senate and, derivatively, its individual members, have suffered an injury.

Congress may eliminate all impediments to standing save the minimal Article III requirements, and expand "standing to the full extent permitted by Article III," *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 100 (1979). The plaintiffs in *Gladstone* relied on the Fair Housing Act of 1968 (42 U.S.C. § 3612) as the statutory basis to bring their action. The Court said that the Fair Housing Act was intended by Congress to allow certain aggrieved citizens to bring such actions so long as they could allege some minimal injury. Similarly, in P.L. 96-86, Congress has recognized a small class of persons who are aggrieved and provided a vehicle for resolving that grievance. Congress intended that an action be brought should one of its members so desire. Plaintiff need only show the Article III requirement of minimum injury.

Even absent a specific statute authorizing legal action, this Court has found that even a minimal or trifling allegation of injury by a plaintiff will suffice to sustain standing for Article III purposes. In *Flast v. Cohen*, 392 U.S. 82 (1968), the Court, in deciding whether tax-

payers had standing to challenge the expenditure of public monies in violation of the Establishment Clause, held that ". . . in terms of Article III limitations on federal court jurisdiction, the question of standing is related *only* to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (Emphasis added.) *Id.* at 101. The Court found, consequently, that although there was a minimum injury to constitutional rights (each taxpayer's miniscule portion of taxes apportioned by HEW to New York parochial schools), since the constitutional principle (establishment of religion) was paramount, the plaintiffs had standing. Similarly, the Court found standing where the allegations of injury were minimal and even trifling in the following cases involving constitutional principles: *McGowan v. Maryland*, 366 U.S. 240 (1961) (five dollar fine and costs); *Harper v. Virginia Board of Elections*, 303 U.S. 663 (1966) (one dollar and fifty cent poll tax); *Engel v. Vitale*, 370 U.S. 421 (1962) (choice of presence or absence during school prayer); and *Baker v. Carr*, 396 U.S. 196 (1962) (fraction of a vote).

Even an indirect general allegation of injury in the absence of an authorizing statute was satisfactory to sustain standing in *United States v. Scrap*, 412 U.S. 669 (1973), where plaintiffs alleged that failure to suspend a freight surcharge would cause them economic, recreational and aesthetic harm. The complaint also alleged that plaintiffs would generally have to pay more for finished products and that the plaintiffs' use of the rivers, streams and recreation areas was adversely affected and that air pollution in the Washington, D.C. metropolitan area would increase. These alleged injuries, though speculative and attenuated, were adequate.

This Court has acknowledged a distinction between those plaintiffs who invoke the judicial process under

statutory authorization and those plaintiffs who do not. In *Sierra Club v. Morton*, 405 U.S. 727 (1972) at 732, the Court said "Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy' . . . ." Similiarly, in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) at 617, the Court said "Although the law of standing has greatly changed in the last ten years, we have steadfastly adhered to the requirements that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction."

From the Court's recognition of this distinction, it can be concluded that where a statute authorizes the invocation of a lawsuit, the Article III requirement of injury is even less than the minimal injury necessary to sustain standing when a plaintiff brings suit without statutory authorization. Thus, the injury which plaintiff here must allege to sustain standing must truly be only the most minimal.

In sum, then, it is highly appropriate for this Court to review this case because of the unsettled status of standing for congressional litigants.

(ii) Separation Of Powers

The three judge court raised a substantial federal question regarding the separation of powers doctrine in interpreting Section 101(c)(2) of Public Law 96-86. It concluded that the "vice of the statute . . . is its muddling of the roles, its blurring of the lines between the branches of government." *McClure v. Carter*, 513 F. Supp. 265, 271. It further concluded that the Congress (the court here meant the Senate) determines not only

the judicial fitness of nominees to the federal bench, but also makes a final and unreviewable determination of their constitutional eligibility. Plaintiff argued to the contrary that only the judiciary may, in the final instance, decide what the law is and interpret the Constitution, and that the Senate could, pursuant to Article II, Section 2, Clause 2, only pass on the judicial fitness of a nominee. The legislative and executive branches agreed with the plaintiff by passing and signing into law Section 101(c)(2) of Public Law 96-86. Based on this Court's decisions in *United States v. Nixon*, 418 U.S. 683 (1974), *Powell v. McCormack*, 395 U.S. 486 (1969), and *Baker v. Carr*, 369 U.S. 186 (1962) the plaintiff believes the three judge court erred in its interpretation of the separation of powers doctrine and that the case should have been decided on its merits.

The merits of this case involve a pure interpretation of a constitutional provision, Article I, Section 6, Clause 2. Senator McClure contends that only the courts, in the last instance, may decide the issue on the merits, that is, the constitutionality of defendant Mikva's appointment to the office of circuit judge; and that the Senate, in consenting to the appointment, is constitutionally competent to pass only upon the political and judicial fitness of the President's nominee.

The foregoing contention is not violative of but consistent with, the separation of powers doctrine because "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

This Court's decision in *Baker v. Carr*, requires resolution of the following considerations to determine whether there is a political question involving separation of powers which makes a case nonjusticiable:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or

> a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U.S. at 217.

The most important one of those questions requiring resolution here is whether there is a textually demonstrable constitutional commitment of the issue to a coordinate branch of government.

In *Powell v. McCormack*, 395 U.S. 486 (1969) the Court was faced with a similar issue in deciding an elected Congressman's right to his seat after having been duly elected and then expelled from the House of Representatives. Pursuant to Article I, Section 5, providing that the House shall be the judge of the qualification of its own members, the House had acted to expel Congressman Powell claiming that it was solely its constitutional duty and power to make such a determination. The Court disagreed and, citing *Baker v. Carr*, stated that "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." 395 U.S. at 521. The Court then examined the constitutional provision in question to determine the textual commitment issue, and held that it must adjudicate Powell's claim.

The respondents in the *Powell* case also argued that the other political question considerations made their case nonjusticiable, particularly, that resolution of the claim would produce a potentially embarassing confrontation between coordinate branches of government. The Court, however, responded that a determination of the merits of petitioner's claim:

> . . . would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law and does not involve a 'lack of the respect due [a] coordinate [branch] of government' nor does it involve an 'initial policy determination of a kind clearly for non-judicial discretion' *Baker v. Carr*, 369 U.S. 186 at 217, 7 L.Ed.2d 663 at 686. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. (citations omitted). 395 U.S. at 548-549.

Similar to *Powell v. McCormack*, this case is one of constitutional interpretation; *i.e.*, did the office to which defendant Mikva was appointed receive an increase in emoluments thereby causing his appointment to be in violation of Article I, Section 6, Clause 2. Moreover, the tests established by *Powell* would not bar the consideration of this case by this Court. First, the matter is not textually committed to any branch of government and, thus, is appropriate for judicial resolution. Second, resolution of the questions presented would not require the Court to move beyond areas of judicial expertise. And, finally, there certainly is no potential for embarrassment if this Court interprets this case on its merits, for Congress and the executive branch, in passing section 10(c)(2) of P.L. 96-86, recognized the constitutional interpre-

tation could be made only by the judicial branch. Thus, this Court need not consider this prudential limitation.

In *Goldwater v. Carter*, 444 U.S. 996 (1979), this Court did not address the standing of congressional plaintiffs even though that issue had been raised below and on appeal. The Court, without a majority opinion, reversed and remanded for dismissal Senator Goldwater's claim of a right to vote on the termination of the United States treaty with the Republic of China. Justice Rehnquist, with Chief Justice Burger and Justices Stewart and Stevens, concluded that the case was political and, therefore, nonjusticiable because it involved the authority of the President in the conduct of our nation's foreign relations. Justice Powell, however, concluded that the case should be dismissed because it was not ripe for consideration, as the Senate had not passed a resolution stating its position that their approval was necessary for termination. In his opinion, Justice Powell took issue with Justice Rehnquist's opinion that the case was nonjusticiable and concluded that if the case were ripe the Court should consider the merits based on the precedents of *Baker v. Carr*, 369 U.S. 186 (1962) and *Powell v. McCormack*, 395 U.S. 486 (1969). *Goldwater*, 444 U.S. at 997.

Justice Powell examined the political question considerations as set forth in *Baker v. Carr*, and determined that the answer to each consideration would require the Court to decide the case if it were ripe for consideration. He reasoned that, though the issue touched on foreign relations, it presented a constitutional question regarding the authority to terminate treaties. Not a simple issue to decide, but one requiring application of ". . . normal principles of interpretation to the Constitutional provisions at issue." 444 U.S. at 997. Similarly, none of the inquiries required to be determined with regard to the political question issue bar this Court from deciding this case on its merits.

In *Riegle v. Federal Open Market Committee*, No. 80-1061 (D.C. Cir. filed June 24, 1981) App. at 17a, in reaction to this Courts holding in the *Goldwater* case, the District of Columbia Circuit developed a new theory for deciding congressional plaintiff cases. The Riegel court concluded that "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action." No. 81-1061, App. at 32a. The court explained its theory that congressional plaintiff cases should be dismissed only when "(i) the plaintiff lacks standing under the traditional tests, or (ii) the plaintiff has standing but could get legislative redress and a similar action could be brought by a private plaintiff." App. at 34a. Even under this theory, plaintiff believes this Court should hear his case inasmuch as he certainly has no legislative redress at this point. And even though a private plaintiff might be able to bring the merits of the case to this Court, that proposition is now speculative at best.

CONCLUSION

This case presents the Court with substantial federal questions regarding standing and the separation of powers doctrine as they relate to suits by legislators which need to be settled by this Court, not only because they themselves are significant, but because unless this Court decides that Senator McClure has standing to bring this action, an alleged serious violation of the Constitution may go unreviewed.

Based on the foregoing, therefore, plaintiff respectfully requests this Court to remand the case back to the U.S. District Court for the District of Idaho for consideration of the merits, or, in the alternative, to set the case down for plenary review of the issue of standing and the separation of powers doctrine, or plenary review of

the issue of standing, the separation of powers doctrine, and for consideration on the merits.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Civil No. 79-1340

JAMES A. MCCLURE, United States Senator, Idaho,
Plaintiff,

v.

JAMES EARL CARTER, PRESIDENT of the United States; and ABNER J. MIKVA,
Defendants.

Filed May 5, 1981

DECISION

Before: FLETCHER, Circuit Judge, and MCNICHOLS and TAYLOR, District Judges, sitting as a Special Three-Judge District Court.

This case comes before this three-judge court on cross-motions for summary judgment. The amended complaint to which the motions are addressed challenges the appointment of former Congressman Abner J. Mikva to a position as a circuit judge for the United States Court of Appeals for the District of Columbia Circuit. The relevant portions of the statute under which the challenge is brought, Act of October 12, 1979, Pub. L. No. 96-86, § 101(c), 93 Stat. 656 (not codified), are set out in the margin.[1] The plaintiff, Senator McClure, asserting

[1] Section 101(c) provides in relevant part:

> Any additional payment [to federal officials] under existing law is not to be construed as an increase in salary or emolu-

that the salaries of federal judges were increased during defendant Mikva's term in Congress, claims that Judge Mikva's [2] nomination, confirmation, and appointment as a circuit judge were in violation of article I, section 6, clause 2 of the United States Constitution (the Ineligibility Clause).[3] Senator McClure asks that we direct the

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ments within the meaning of Article I, section 6, clause 2 of the Constitution, except that:

(1) Any Member of Congress, whether he voted to confirm or not to confirm the appointment of any judge appointed during the 96th Congress to the United States Court of Appeals for the District of Columbia, or whether he abstained from, or was not present for such vote, may bring a civil action in the United States District Court for the District of Columbia or in any United States District Court in the State he represents to contest the constitutionality of the appointment and continuance in office of said Circuit Judge on the ground that such appointment and continuance in office is in violation of Article I, section 6, clause 2 of the Constitution;

(2) The designated United States District Court shall have exclusive jurisdiction, without regard to the sum or value of the matter in controversy, to determine the validity of such appointment and continuance in office;

(3) Any action brought under this section shall be heard and determined by a panel of three judges in accordance with the provisions of section 2284 of title 28, United States Code. Any appeal from the action of a court convened pursuant to such section shall lie to the Supreme Court; and

(4) Any judge designated to hear any action brought under this section shall cause such action to be in every way expedited.

[2] While plaintiff insists on referring to defendant Mikva as "Mr." his proper title is "Judge" until determined otherwise.

[3] Article I, section 6, clause 2 of the United States Constitution provides in relevant part:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under

President to notify defendant Mikva that his appointment was in violation of the Constitution, and that we notify defendant Mikva that his appointment was void *ab initio* and that he must vacate his office. The threshold question before us is whether we have jurisdiction to hear the case. We cannot reach the merits of Senator McClure's challenge unless we answer that question affirmatively.

BACKGROUND

The procedural posture of this case and the events in its background provide a context that is helpful in analyzing and attaching appropriate legal significance to the contentions made by the parties. The procedural steps taken and a summary of pertinent portions of the pleadings are set forth in the margin.[4]

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the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; . . . .

[4] The original complaint was filed in the United States District Court for the District of Idaho on September 25, 1979, by plaintiff McClure, a United States Senator from the State of Idaho. Jurisdiction was alleged under 28 U.S.C. §§ 1331 (federal question) and 2201 (declaratory judgment). The original defendants were James Earl Carter, President of the United States, and J. Stanley Kimmitt, Secretary of the United States Senate. The complaint sought a declaration that then-Congressman Abner J. Mikva was constitutionally ineligible for appointment to the United States Court of Appeals for the District of Columbia Circuit. The suit also sought an injunction against defendant Kimmitt to prevent him from communicating the results of the United States Senate's vote of confirmation of Abner Mikva to the President.

On September 26, 1979, defendant Carter signed the commission appointing Abner J. Mikva a United States Circuit Judge for the District of Columbia Circuit. On October 16, 1979, the plaintiff moved to dismiss defendant Kimmitt. The motion was granted.

The amended complaint was filed on November 6, 1979, once more naming President Carter as a defendant and adding Abner J. Mikva as a defendant. Jurisdiction was again premised on 28 U.S.C. §§ 1331 and 2201 but was additionally alleged under

Congressman Abner J. Mikva was nominated by President Carter as circuit judge for the District of Columbia Circuit. A number of senators, including Senator McClure, opposed the appointment. Indeed, a number of these senators, again including Senator McClure, voiced their opposition on the Senater floor,[5] relying in their

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section 101(c) of the Act of October 12, 1979, Pub. L. No. 96-86, 93 Stat. 657 (not codified). Plaintiff requested a three-judge court pursuant to the terms of section 101(c). The amended complaint requested the relief described in the text of the opinion.

The defendant President answered the amended complaint and requested that the action be dismissed. Defendant Mikva moved to be dismissed as defendant based on his allegation that the court lacked personal jurisdiction over him.

On December 13, 1979, the district judge originally assigned to the case sent to the Honorable James R. Browning, Chief Judge of the United States Court of Appeals for the Ninth Circuit, a Notification and Certificate that a three-judge district court should be convened. On December 21, 1979, the President moved for withdrawal of the Notification and Certificate. The motion was denied and on February 4, 1980, Chief Judge Browning designated a three-judge district court.

On February 25, 1980, the two defendants moved for summary judgment, with defendant Mikva expressly reserving his defense that the court lacked personal jurisdiction over him. The plaintiff responded on March 28, 1980, by opposing the defendants' motions and himself moving for summary judgment. Oral argument was heard on June 26, 1980. The court ruled from the bench that it was properly convened as a three-judge court.

[5] The constitutional question and the more general question of Judge Mikva's qualifications and fitness for judicial office were extensively debated on the floor of the Senate, 125 Cong. Rec. S13342-S13362 (daily ed. Sept. 25, 1979). During the debate, Senator Edward Kennedy introduced two detailed legal memoranda prepared by the Justice Department on the constitutional question, so that the senators would be fully informed. *Id.* at S13360-S13362. Senator McClure made a speech attacking Congressman Mikva's political and social views and advised his colleagues that he would oppose the nomination specifically on that basis, urging them to do the same. *Id.* at S13351-S13353.

arguments on their belief that then-Congressman Mikva was philosophically unsuited to the job, as well as on their view that he was constitutionally ineligible for appointment because of the proscriptions of the Ineligibility Clause. These arguments failed to persuade a sufficient number of their fellow senators, and a majority of the Senate voted to confirm defendant Mikva as judge on September 25, 1979. 125 Cong. Rec. S13363 (daily ed. Sept. 25, 1979).

After the Senate voted to confirm Judge Mikva, Senator McClure and others proposed to the Senate the jurisdictional statute under which Senator McClure now sues. The Senate attached the proposed statute as a rider to an appropriation bill on October 10, 1979, 125 Cong. Rec. S14320, S14325 (daily ed. Oct. 10, 1979), and the House of Representatives agreed to it two days later. *Id.* H9081 (daily ed. Oct. 12, 1979).

The jurisdictional statute is unusual in several respects. First, it sets out a single substantive ground for challenging a new judicial appointment—violation of the Ineligibility Clause. A challenge to a judicial appointment on any other ground must be brought under some other statute. Second, it limits both in time and by institution the judicial appointments that may be challenged under the statute. It authorizes challenges to only those judicial appointments made during the 96th Congress and only those made to the United States Court of Appeals for the District of Columbia Circuit. A challenge to a judge appointed during any other Congress or to any other court must be brought under some other statute. Perhaps not coincidentally, the only judicial appointment that fits within the statute's limitations and might be subject to challenge on Ineligibility Clause grounds is that of defendant Mikva. Third, the statute authorizes suits by United States senators and members of the House of Representatives, irrespective of whether the senators voted for or against the appointment or,

in the case of members of the House, voted at all. Fourth, the statute provides that suit may be brought either in the United States District Court for the District of Columbia or in any federal district court in the state which the senator or member of the House represents, irrespective of the distance between that state and the District of Columbia and irrespective of any connection between that state and the judicial appointment sought to be challenged.

In short, what the statute appears to authorize is a mechanism whereby a senator or member of the House of Representatives may challenge in a federal court in his or her home state the validity of the judicial appointment of a single person, Judge Mikva. Such a statute has, at one level, an entirely salutory purpose, for it would be antithetical to the rule of law that all government officials, and judges in particular, are pledged to uphold if a federal judge were permitted to take office in violation of the express terms of the United States Constitution. The statute is, however, problematic at quite another level, for under article III of the Constitution federal courts may decide only cases and controversies properly brought before them, by parties with sufficient stake in the dispute to ensure that a decision by the courts is not inconsistent with the limited role the courts must play within our tripartite federal system of government. The fact that the statute makes senators and members of the House, and no others, "enforcers" of the Constitution in the judicial forum implicates special concerns regarding the separation of powers.

JUSTICIABILITY

The federal courts have consistently exercised care to limit their jurisdiction to the case and controversy requirement of article III. This governing principle is more easily stated than applied, however, since compre-

hended within the limitations imposed by the terms "cases" and "controversies" are concerns about the proper functioning of courts in dispute resolution and the allocation of power among the three branches of government.

Our initial analysis of the unusual statute before us embraced a full range of inquiry into the various aspects of justiciability.[6] We conclude, however, that one of its aspects—the requirement of standing—is dispositive. Article III requires that the parties to a lawsuit have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, (1962). The

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[6] The Supreme Court described the concept of justiciability in *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968):

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

One aspect of justiciability not raised by the parties, but which gave this court some pause, is the possibility that this court has been asked for an advisory opinion, an idea that is inconsistent with the "case" or "controversy" requirement of the Constitution. *Muskrat v. United States*, 219 U.S. 346 (1911).

Although the statute the Senator relies on is facially similar to the statute found ineffective in *Muskrat*, the differences are signficant enough to remove the case from the proscriptions of whatever remains of the *Muskrat* rationale. *See, e.g., Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Thus, we are not asked for an advisory opinion.

issue confronting us is whether Senator McClure has such a personal stake.

The interpretations of the doctrine of standing are manifold. The Supreme Court has considered the issue in numerous contexts and has expressed the standing requirements in several formulations. Some of the formulations leave one with the sense that standing can never be determined until the case has been tried on the merits; only at that point can one say with certainty that the plaintiff did or did not have a protected legal right or that he or she suffered a wrong for which the law provides a remedy. The distinction between injury "in fact" and injury "in law" and whether either or both remain requirements for standing is not always clear. The Court has at times required that a plaintiff show a distinct "legal interest" before he or she may have standing in federal court. *E.g., Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969). More recently, the Court has said that a plaintiff must merely be within the "zone of interests" sought to be protected by the constitutional or statutory guarantee in question. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In other cases, the Court has suggested that a plaintiff need only show "injury in fact" to satisfy the personal stake requirement of article III. *E.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). A person may thus have standing, despite the lack of a demonstrable legal right, if he can show an injury in fact and, we would surmise, some colorable legal claim. The law is less clear that a person without an injury in fact may have standing, although it appears that at least in some limited circumstances a statute may give such a person a cause of action based on a rationale of enforcing the public interest through private persons concerned about public questions. *See, e.g., Sierra Club*

v. Morton, 405 U.S. 727, 732 n.3 (1972); *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 814 (D.C. Cir. 1975); Clean Air Act, 42 U.S.C. § 7604 (Supp. II 1978) (authorizing civil suits by "any person"). But in *Warth v. Seldin*, 422 U.S. 490, 501 (1975), the Court, in acknowledging that Congress may grant an express right of action that otherwise would be barred on prudential grounds, affirmed that "the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."

In light of the foregoing, we now inquire whether Senator McClure has standing to bring this suit consistent with the requirements of article III. The analysis must be two-fold. First, without reference to any particular statute, does Senator McClure, either as a private individual or as a senator, have a sufficient personal stake in the challenge to Judge Mikva's appointment to give him standing? Second, if Senator McClure does not have a sufficient personal stake under that criterion, has Congress, by the statute under which Senator McClure seeks to sue, properly conferred a sufficient "right" upon him to give him standing and to satisfy the case or controversy requirement of article III?

Without reference to the statute under which Senator McClure seeks to sue, we conclude that a United States Senator, suing in either his individual capacity or his official capacity as a senator, lacks standing to challenge the validity of the appointment of a federal judge. In *Ex Parte Levitt*, 302 U.S. 633 (1937) (per curiam), the Supreme Court denied a motion brought by a member of the Supreme Court bar for an order to show cause why Justice Black, then recently appointed to the Supreme Court, should be permitted to serve as a Justice. The challenge was based on the Ineligibility Clause, the same constitutional provision relied upon by Senator

McClure in this suit. In denying the motion for lack of standing, the court said that "[i]t is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U.S. at 634. As a private individual, then, it seems that Senator McClure does not have sufficient personal interest in the validity of Judge Mikva's appointment to have standing in federal court.

Senator McClure contends, however, that his special duties and repsonsibilities as senator gave him standing to challenge the appointment. The precise nature of a legislator's standing to sue in federal court is a matter of no small importance, for a readier access to courts by legislators, as legislators, is likely to give the courts increased opportunity and obligation to decide matters of public importance that might previously have been left to the legislative and executive branches. It is nevertheless the case that, in at least some circumstances, a legislator does have standing to sue as a legislator when he or she would not have standing as an individual. The touchstone is whether the legislator's interest in "maintaining the effectiveness of [his] votes" is sufficient to confer standing to challenge an action imparing that effectiveness. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). In *Coleman*, the Supreme Court held that a group of Kansas legislators had standing to challenge both the right of the state's lieutenant governor to break a tie vote in the state senate, and the efficacy of the state's attempted ratification of an amendment to the United States Constitution which the state legislature had previously rejected. This principle has re-emerged in a recent case in the District of Columbia Circuit, in which Senator Kennedy was held to have standing to

challenge President Nixon's pocket veto of a health care bill during a congressional recess. *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). Senator Kennedy argued that the bill could not validly have been pocket vetoed during a recess, and that President Nixon's action not only deprived the Senator's earlier vote in favor of the bill of its effectiveness, but also deprived him of the opportunity to vote to override a normal veto.[7]

It is difficult to see how Senator McClure can argue that the effectiveness of his vote is impaired by the appointment of former-Congressman Mikva to the federal bench. Senator McClure had the opportunity to persuade his colleagues to vote against the confirmation and, in the conscientious performance of his duties, Senator McClure did just that.[8] That he and like-minded senators did not prevail in the Senate does not mean that the effectiveness of Senator McClure's vote was impaired within the meaning of *Coleman v. Miller*. It means merely that he was on the losing side. Certainly no one would contend, and we do not understand Senator McClure to contend, that the losing senators in any vote should automatically have the right to appeal to a federal court for a determination of the correctness of the result approved by the majority of their colleagues. If this were the case, federal courts would on such occasions be little more than legal advisors to the Congress, whose counsel could be obtainted at the instance of any single

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[7] *See also Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1973) (member of House of Representatives lacks standing to seek declaratory judgment prohibiting certain illegal activities by Central Intelligence Agency); *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975) (members of House of Representatives lack standing to challenge expenditure of funds for military action in Southeast Asia); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2nd Cir. 1973) (member of House of Representatives lacks standing to seek declaratory judgment prohibiting military action in Cambodia).

[8] *See* note 4, *supra*.

member of that body. This would, of course, amount to the giving of advisory opinions that, whatever their desirability in a particular case, we are forbidden to provide. Thus, at least without a statute authorizing such suits, Senator McClure lacks standing to challenge, either as an individual or as a Senator, the appointment of former Congressman Mikva to the Court of Appeals.

We must therefore consider the effect, if any, of the jurisdictional statute under which Senator McClure seeks to sue. It is difficult to see how this statute may, consistent with article III, confer upon a senator or member of the House of Representatives a "right" to seek a decision from a federal court that such a senator or member of the House would otherwise be powerless to procure. The statute is not premised on protecting the effectiveness of a legislator's vote under the rationale of *Coleman v. Miller*, for it purports to grant standing to senators who voted for Judge Mikva as well as to those who voted against him. Furthermore, the statute purports to grant standing to members of the House of Representatives, who had no vote on the appointment at all. And we see no relevance, at least insofar as standing for members of the House is concerned, in the fact that Judge Mikva was, before his appointment to the bench, himself a member of the House.

Thus, we hold that Senator McClure, even with aid of the special jurisdictional statute on which he seeks to rely, does not have standing to bring this suit. The jurisprudential considerations go beyond simply setting proper limits on judicial power and containing its exercise within its rightful sphere. They serve also to protect against other branches of government, no matter how well-intentioned, voluntarily ceding to the federal judiciary powers and responsibilities that rightfully belong to the legislature or the executive. At bottom, the vice of the statute before us is its muddling of the roles, its blurring of the lines between the branches of government.

Members of Congress are the democratically-elected representatives of the people, chosen by them to enact the laws of the United States, to advise and consent to the appointment of policy-makers in the executive branch and judges in the judicial branch, and to perform certain other functions prescribed by the Constitution. The statute under which Senator McClure brings this suit casts members of Congress in the role of special attorneys general, to plead before this court for a second opinion as to whether their judgments were right in voting for or against the confirmation of Judge Mikva. Under the Constitution, it was the duty of Congress itself, in the first instance, to determine Judge Mikva's qualifications both on the merits and on the issue of whether he was constitutionally eligible to serve as a judge. To allow members of Congress to change hats, as it were, to plead the unconstitutionality of their own acts before this court on the basis of an argument already debated in the Senate but lost there by vote, would, we suggest, set a dangerous precedent. We find that this court does not have jurisdiction, and we accordingly dismiss.[9]

/s/ Betty B. Fletcher
BETTY B. FLETCHER
United States Circuit Judge

/s/ Ray McNichols
RAY MCNICHOLS
United States District Judge

/s/ Fred M. Taylor
FRED M. TAYLOR
United States District Judge

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[9] Since we have determined that plaintiff McClure does not have standing to bring this suit, we do not reach the question of personal jurisdiction over Judge Mikva nor any of the other issues raised by the parties.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Civil No. 79-1340

JAMES A. MCCLURE, United States Senator, Idaho,
Plaintiff,

v.

JAMES EARL CARTER, PRESIDENT of the United States; and ABNER J. MIKVA,
Defendants.

Filed May 5, 1981

ORDER OF DISMISSAL

Before: FLETCHER, Circuit Judge, and MCNICHOLS and TAYLOR, District Judges, sitting as a Special Three-Judge District Court.

The court having previously entered its decision that the plaintiff lacks standing to bring this suit and that the court therefore lacks jurisdiction over the subject matter,

IT IS THEREFORE ORDERED:

That the above entitled case be, and hereby is, DISMISSED.

/s/ Betty B. Fletcher
BETTY B. FLETCHER
United States Circuit Judge

/s/ Ray McNichols
RAY MCNICHOLS
United States District Judge

/s/ Fred M. Taylor
FRED M. TAYLOR
United States District Judge

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 79-1340

JAMES A. MCCLURE, United States Senator, Idaho,
Plaintiff,

—VS—

JAMES EARL CARTER, PRESIDENT of the United States; and ABNER J. MIKVA,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that JAMES A. McCLURE, plaintiff above named, hereby appeals to the United States Supreme Court as provided for in P.L. 96-86 and 28 United States Code Sections 2284 and 2101, from the final judgment dismissing this case entered in this action on the 5th day of May, 1981.

DATED: June 9, 1981.

RUNFT, STECHER & COFFIN, CTD.

By _____
DAVID H. MARTIN, Esq. JOHN F. ADLARD, of the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the within and foregoing NOTICE OF APPEAL was made this 9th day of June, 1981, by mailing copies thereof, by United States Mail, postage prepaid, to the following persons:

Ronald Reagan, President
United States of America
c/o Solicitor General
Washington, D.C. 20530

Hon. Abner Mikva
United States Court of Claims
c/o Solicitor General
Washington, D.C. 20530

Fred Fielding, Esq.
Counsel to the President
The White House
Washington, D.C. 20000

The Hon. Abner Mikva
United States Court of Claims
Washington, D.C. 20000

JOHN F. ADLARD

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1061

DONALD W. RIEGLE, JR., MEMBER, U.S. SENATE,

Appellant

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*

Appellees

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 79-1703)

Argued January 15, 1981

Decided June 24, 1981

Grasty Crews, III, for appellant.

Lewis K. Wise, Attorney, Department of Justice with whom *Alice Daniel*, Assistant Attorney General, *Charles F. C. Ruff*, United States Attorney and *Anthony Steinmeyer*, Attorney, Department of Justice were on the brief for appellees.

Before: ROBB and EDWARDS, *Circuit Judges* and PENN *, *United States District Judge* for the District of Columbia

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the Court filed by *Circuit Judge* ROBB.

ROBB, *Circuit Judge*: This case presents the question whether a United States Senator has standing to challenge the constitutionality of the procedures established by the Federal Reserve Act, 12 U.S.C. § 221 *et seq.* (1976) for the appointment of the five Reserve Bank members of the Federal Open Market Committee. A corollary question is whether, assuming the Senator has standing, this court should afford him relief. The complaint of the appellant, Senator Donald W. Riegle, Jr., of Michigan, was dismissed by the United States District Court for the District of Columbia on the ground that the Senator lacked standing to seek injunctive relief from the allegedly unconstitutional procedures authorized by the Act. *Riegle v. Federal Open Market Committee, et al.*, 84 F.R.D. 114, 116 (D.D.C. 1979) (Gesell, J.). We affirm on a ground different from that relied upon below.

I.

The Federal Reserve System, which was created by Congress in 1913 as this nation's central bank, is comprised of public and private entities organized on a regional basis with federal supervisory authority.[1] The System includes a seven-member Board of Governors, the twelve regional Federal Reserve Banks, the FOMC, the Federal Advisory Council, and approximately 5,500 privately-owned member commercial banks. (Br. of FOMC at 4) The primary role of the System in the conduct of monetary policy is to facilitate the achievement of national economic goals through influence on the avail-

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[1] *See* Reuss v. Balles, 189 U.S.App.D.C. 303, 584 F.2d 461, 462-65, *cert. denied*, 439 U.S. 997 (1978) for a description of the Federal Reserve System, open market operations, and the evolution and functions of the FOMC. *See also* T. MAYER, J. DUESENBERRY, & R. ALIBER, MONEY, BANKING, AND THE ECONOMY (1981); "A look Inside Paul Volcker's Fed," *N.Y. Times* (May 3, 1981), sec. 3, at 1, 8-9.

ability and cost of bank reserves, bank credit, and money. Three basic mechanisms employed by the System to implement monetary policy are open market operations, regulation of member bank borrowing from the Federal Reserve Banks, and establishment of member bank reserve requirements. The most flexible and potentially significant of these tools is open market transactions. (Br. at FOMC at 6)

Open market trading, which consists of the purchase and sale of government and other securities in the financial markets by the Reserve Banks, is exclusively directed and regulated by the FOMC. 12 U.S.C. § 263 (b) (1976). The FOMC, like the System as a whole, is constituted to reflect both public and private interests. Since 1935 the FOMC has been composed of the seven members of the Board of Governors of the Federal Reserve System, 12 U.S.C. § 241 (1976), who are appointed by the President with the advice and consent of the Senate, and five representatives of the Federal Reserve Banks, who are elected annually by the boards of directors of the Banks. 12 U.S.C. § 263(a) (1976). Since 1942 Congress has required that the five Reserve Bank members of the FOMC be either presidents or first vice presidents of the Reserve Banks. 12 U.S.C. § 263(a). The Reserve Banks are private corporations whose stock is owned by the member commercial banks within their districts. 12 U.S.C. § 321 (1976). These member commercial banks elect six of the nine members of the board of directors of each Reserve Bank, and the Board of Governors of the Federal Reserve System selects the remaining three. 12 U.S.C. §§ 302, 304 (1976). The presidents and first vice presidents of the Reserve Banks, although selected by the respective boards of directors, are subject to the approval, suspension, and removal authority of the Board of Governors. 12 U.S.C. §§ 341, 248 (1976). In short, the FOMC consists of seven members who hold their offices by virtue of presidential ap-

pointments confirmed by the Senate, and five members who are elected by the boards of directors of the Banks and who hold their offices subject to the approval of the Board of Governors. 12 U.S.C. § 263(a).

The securities transactions directed by the FOMC have a significant effect on the financial markets. In 1974, for example, the FOMC alone was responsible for approximately $19.4 billion in outright transactions in U.S. Government Securities. (Br. of Riegle at 5) These transactions potentially affect the value of the dollar, foreign exchange rates, interest rates, investment, and employment. *Id.* Approximately every 45 days, the FOMC formulates its monetary policy objectives for the immediate future by setting targets for growth rates in the money supply and the range of variance in the Federal Funds rate (the member banks' rate for overnight loans of excess reserves to other banks). The FOMC then issues a domestic policy directive to the Federal Reserve Bank of New York for the management of the System Open Market Account, which is a central entity representing the open market transaction interests of the twelve Reserve Banks. The manager of the Account, who maintains daily contact with Federal Reserve staff members in Washington, engages in financial transactions designed to achieve the monetary conditions sought by the FOMC. Reserve Banks are prohibited under the Act from engaging in any open market transactions except those directed by the FOMC through the Account. 12 U.S.C. § 263(b).

Considering the substantial economic power wielded by the FOMC, it is not surprising that controversy over the balance between public and private control of the Committee has existed since its creation. As originally constituted, the FOMC was privately dominated, consisting solely of representatives of the twelve Reserve Banks. Banking Act of 1933, 48 Stat. 162. This arrangement

was unsatisfactory to those who favored greater governmental control over disposition of Reserve Bank funds. During debates on the Senate floor preceding passage of the Banking Act of 1935, 49 Stat. 704, Chairman Carter Glass of the Senate Banking Committee (a supporter of Reserve Bank control of the FOMC) explained the legislative compromise between public (Board of Governors) and private (Reserve Bank) interests which produced the present procedure for constituting the FOMC:

> [We are] amazed to have it proposed that the Federal Reserve Board alone should constitute the open-market committee of the system. . . . The Government of the United States has never contributed a dollar to one of the Reserve Banks; yet it is proposed to have the Federal Reserve Board, having not a dollar of pecuniary interest in the Reserve funds or the deposits of the Federal Reserve banks or of the member banks . . . to make such disposition of the reserve funds of the country, and in large measure the deposits of the member banks of the country, as they may please . . . . [I]n order to reconcile bitter differences there was yielding, and we have now proposed an open-market committee composed of all 7 members of the Federal Reserve Board and 5 representatives of the regional reserve banks.

79 Cong. Rec. 11778 (1935).

Despite the passage of the compromise represented by the Banking Act of 1935, the debate over public and private control of the FOMC has continued during the past 48 years. The late Congressman Wright Patman, Chairman of the House Banking Committee, asserted in 1938 that the Reserve Bank members of the FOMC did not represent the "people's interest."[2] Mr. Patman's

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[2] Hearings before the House Banking and Currency Committee on H.R. 7230, 75th Cong., 3d Sess. 56 (1938).

successor, Congressman Henry S. Reuss, has made several unsuccessful attempts, both in Congress by amendment of 12 U.S.C. § 263(a) and in the federal courts, to require that the five Reserve Bank members of the FOMC be appointed with the advice and consent of the Senate pursuant to the Appointments Clause. United States Constitution, Art. II, sec. 2, cl. 2. Based on his belief that the work of the FOMC "is essentially a governmental function, and should not be exercised by private people."[3] Mr. Reuss in 1976 introduced the "Federal Reserve Reform Act," H.R. 12934, 94th Cong., 2d Sess. (1976), which in part would have required that the five Reserve Bank seats on the FOMC be limited to Bank presidents appointed by the President with the advice and consent of the Senate. The House Banking Committee defeated this provision on April 30, 1976. (Br. of FOMC at 21) Mr. Reuss then brought an action in federal court seeking, in part, to have 12 U.S.C. § 263 (a) declared unconstitutional. The District Court dismissed the action on the ground that the Congressman lacked standing to sue either in his capacity as a congressman or as a private bondholder. *Reuss v. Balles*, 73 F.R.D. 90 (D.D.C. 1976) (Parker, J.), *aff'd*, 189 U.S. App. D.C. 303, 584 F.2d 461, *cert. denied*, 439 U.S. 997 (1978). On April 1, 1980 Congressman Reuss introduced another bill, H.R. 7001, which would amend 12 U.S.C. § 263(a) in the manner sought by Senator Riegle in this case: a prohibition on voting by the five Reserve Bank members of the FOMC. This legislation was not enacted.[4] (Br. of FOMC at 21-22)

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[3] Hearings before the Subcommittee on Domestic Finance of the House Committee on Banking and Currency "The Federal Reserve System After Fifty Years," 88th Cong., 2d Sess. 37 (1964).

[4] H.R. 7001, after consideration by the Subcommittee on Domestic Monetary Policy, was forwarded as a clean bill, H.R. 8223, to the Committee on Banking on October 1, 1980. The bill died within this Committee.

Senator Riegle instituted the present suit on July 2, 1979 (prior to the introduction of H.R. 7001 by Congressman Reuss) in the United States District Court for the District of Columbia, seeking injunctive relief in the form of an absolute prohibition on voting by the Reserve Bank members of the FOMC. (J.A. at 8) In an opinion by District Judge Gesell, the court dismissed the action for lack of standing. *Riegle v. Federal Open Market Committee, supra,* at 116. The court reasoned that

> Senator Riegle's injury is of a political nature, deriving solely from the acts or omissions of his colleagues and not in any way from the actions of the named defendants. *Reuss v. Balles, supra* 584 F.2d at 468. . . . What the Court must decide is whether or not a Congressman from either chamber has standing to challenge the constitutionality of a statutory provision on which he has failed to persuade his colleagues in the past and remains free to attempt persuasion in the future. The Court concludes that to confer standing upon such a Congressman without more would improperly interfere with the legislative process.

84 F.R.D. at 116 (citations omitted). The decision of the District Court is now before us on appeal.

II.

Senator Riegle alleges that both the defendant individuals, "[b]y acting as officers of the United States when their nominations have never been submitted to the Senate," and the defendant executive agency, "[b]y permitting the defendant individuals to act as officers of the United States when their nominations have never been submitted to the Senate," deprive him of his constitutional right to vote in determining the advice and consent of the Senate to the appointment of the five Reserve Bank members of the FOMC. (Complaint, J.A.

at 11) When ruling on a motion to dismiss for want of standing, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). We assume, therefore, that the procedure for constituting the FOMC contained in 12 U.S.C. § 263(a) of the Act results in a deprivation of Senator Riegle's constitutional right to advise and consent regarding the appointment of the defendant officers of the executive branch. Senator Riegle seeks not declaratory relief but rather "an injunction against their [five Reserve Bank members] *voting* as members of the FOMC, conduct which deprives him of *his* right to vote in determining the advice and consent of the Senate to the appointment of officers at the highest level of government." (Br. of Riegle at 43) (Emphasis in original)

Two contradictory principles pervade the opinions of this court concerning the standing of congressional plaintiffs. First, no distinctions are to be made between congressional and private plaintiffs in the standing analysis. As we stated in *Harrington v. Bush*, 180 U.S. App. D.C. 45, 553 F.2d 190, 204 (1977) (emphasis omitted), "there are no special standards for determining Congressional standing questions." Second, this court will not confer standing on a congressional plaintiff unless he is suffering an injury that his colleagues cannot redress. When congressional plaintiffs have sought to accomplish in this court what they were unable to persuade their colleagues to do, we have usually refused to confer standing because of our concern for non-interference in the legislative process. *See, e.g., Reuss v. Balles, supra; Harrington v. Bush, supra. Cf. Kennedy v. Sampson*, 167 U.S. App. D.C. 192, 511 F.2d 430 (1974), holding that nullification of a senator's vote due to pocket veto of bill by the President constitutes sufficient injury to confer

standing; *Goldwater v. Carter*, 199 U.S. App. D.C. 115, 617 F.2d 430 (*en banc*), holding that disenfranchisement of a senator because of the attempt by the President to terminate the Taiwan Treaty without the advice and consent of the Senate is injury sufficient to confer standing, *judgment vacated*, 444 U.S. 996 (1979) (*mem.*). We believe that these two contradictory principles create unnecessary confusion when applied to suits brought by congressional plaintiffs. As the former Chief Judge of this court recently observed,

> There can be no peaceful coexistence between, on the one hand, the notion that legislators are treated like any other plaintiff for standing purposes, and, on the other, the idea that courts should rigorously scrutinize whether the congressional plaintiff's true quarrel is with his colleagues, rather than the executive. There is no general requirement that a private litigant employ self-help before seeking judicial relief. Nor should there be, because an ordinary plaintiff, having suffered injury in fact within the contemplation of the law he invokes, is entitled to his day in court. If the plaintiff passes the standing test and presents a justiciable dispute, it is assumed that the political branches have decided to commit such disputes to the judiciary and, barring extraordinary circumstances, that is a judgment which courts are bound to respect.

Hon. Carl McGowan, "Congressmen in Court: The New Plaintiffs," 15 GA. L. REV. 241, 254-255 (1981) (McGowan) (citations omitted). Accordingly we shall proceed by applying to this case the traditional standing tests for non-congressional plaintiffs gleaned from opinions of the Supreme Court. Thereafter, we shall examine what additional considerations, if any, must enter

our analysis by virtue of the plaintiff's status as a Member of the United States.[5]

The Supreme Court in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), established a two-part test for standing: injury (i) in fact and (ii) to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 152-53. A causation requirement was added in *Warth v. Seldin*, *supra* at 505: the plaintiff must prove that "the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." This causation requirement was elaborated upon in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 45 (1976), where the Court observed that "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Again, however, the Court stated the causation requirement in the alternative, quoting *Warth v. Seldin*, *supra*: the causation requirement is satisfied if the plaintiff establishes that the injury was "the consequence of the defendants' actions" or that exercise of the court's remedial powers would redress the injury. 426 U.S. at 45. *See also Duke Power Co. v. North Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978). Although recent cases have suggested a slight relaxation of the above tests, *see, e.g., Duke Power*, *supra* at 80-81, the

[5] By postponing consideration of this court's congressional standing opinions until the latter part of the discussion, we seek to illustrate the conceptual imprecision which results from attempts to achieve through standing analysis the resolution of those separation-of-powers problems peculiar to congressional plaintiff cases. *See generally*, McGowan, *supra*; Note, "Congressional Access to the Federal Courts," 90 HARV. L. REV. 1632 (1977).

three requirements stated above present the maximum burden which a plaintiff must bear to attain standing: establishment of (i) injury-in-fact (ii) to an interest protected by the relevant law (iii) where the injury is caused by defendants' actions or capable of judicial redress.

We think it may be argued plausibly that Senator Riegle has met the above burden. First, assuming that the five Reserve Bank members of the FOMC are officers who must be appointed with the advice and consent of the Senate, Riegle's inability to exercise his right under the Appointments Clause of the Constitution is an injury sufficiently personal to constitute an injury-in-fact. As the Court observed in *Warth v. Seldin*, *supra* at 498-99, the plaintiff must allege " 'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Second, with regard to the causation requirement, we note that the named defendants in this action (the five Reserve Bank members of the FOMC) are not the causes of the injury to Senator Riegle. The five Reserve Bank members were elected by the directors of the Federal Reserve Banks. It is these directors, rather than the five FOMC members in question, who are exercising an appointment power which deprives Senator Riegle of his right to vote on determining the advice and consent of the Senate to the appointments of officers. Thus, the requirement that "the asserted injury was the consequence of the defendants' actions," *Warth v. Seldin*, *supra*, has not been met. However, as noted above at page 10, the causation requirement can also be met by showing that "prospective [judicial] relief will remove the harm." *Warth v. Seldin*, *supra*. Because it is within the power of this court to redress the alleged injury by holding that 12 U.S.C. § 263(a) is unconstitutional, the causation requirement

has been satisfied despite the naming of inappropriate defendants.[6] Third, the interest which Riegle claims was injured by defendants' action (his right to advise and consent to the appointment of officers of the executive branch) is within the zone of interests protected by the Appointments Clause of the Constitution, *supra*. In short, although there is room for argument as to whether Senator Riegle clearly satisfies all requirements of the most stringent version of the Supreme Court's standing test, we think it reasonable to hold that he has standing.[7]

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[6] Although it can be argued that the Senate rather than the directors of the Federal Reserve Banks has, through the passage of 12 U.S.C. § 263(a) of the Act, caused Riegle's injury, to conclude therefrom that the Senator would not satisfy the first formulation of the causation test even had he named the Bank directors as defendants would violate the principle of equality between private and congressional plaintiffs in the standing inquiry. When a plaintiff alleges injury by unconstitutional action taken pursuant to a statute, his proper defendants are those acting unconstitutionally under the law (i.e., the Bank directors), and not the legislature which enacted the statute. *See generally, Marbury v. Madison*, 5 U.S. 137, 175-80 (1803).

[7] This case differs from Reuss v. Balles, *supra* at note 1, where standing was denied to a congressman who claimed, in part, that improper delegation of responsibilities to the FOMC resulted in usurpation of his powers under Article I, sec. 8 of the Constitution to coin and regulate the value of money, to regulate commerce, and to borrow money on the credit of the United States. *Id.* at 467. The court noted in the *Reuss* case that judicial relief could not possibly cure the alleged injury, for even were the court to require that all FOMC members be presidential appointees, the Committee would retain delegated powers and the congressman's role in setting monetary policy would not be enhanced by the judicial relief he sought. In this case, on the other hand, judicial relief in the form of invalidation of 12 U.S.C. § 263(a) would prevent the directors of the Banks from exercising their allegedly unconstitutional appointments of the five Reserve Bank members of the FOMC.

III.

Appellant's status as a Member of the United States Senate, however, raises separation-of-powers concerns which are best addressed independently of the standing issue. As we observed *supra* at pages 8-9, the principle that a legislator must lack collegial or "in-house" remedies before this court will confer standing has been a theme of our congressional plaintiff opinions. This principle is a departure from traditional standing analysis because it violates the principle of equality between legislator and private plaintiffs; non-legislator plaintiffs are not routinely denied standing because of the presence of an alternative remedy. Moreover, the inappropriateness of the collegial remedy principle as an aspect of congressional standing analysis has resulted in its inconsistent application in the case law of this court. For example, in *Public Citizen v. Sampson*, 379 F. Supp. 662 (D.D.C. 1974), *aff'd mem.*, 169 U.S. App. D.C. 301, 515 F.2d 1018 (1975), *Harrington v. Bush*, *supra* at 212-214, and *Reuss v. Balles*, *supra* at 468, standing was withheld from congressional plaintiffs in part because their power to vote, i.e., to enact legislation to cure the alleged injury, remained unimpaired. Yet in *Kennedy v. Sampson*, *supra*, the court conferred standing on Senator Kennedy, to challenge the legality of an attempted pocket veto of a bill for which he had voted. We reasoned that executive impairment of the Senator's past vote had nullified Kennedy's legislative power. *Id.* at 436. The Senator had, however, collegial remedies comparable to those which negated standing in the *Public Citizen*, *Harrington*, and *Reuss* cases; Senator Kennedy's power to reintroduce the relevant legislation in the next session of Congress and to vote thereon remained unimpaired. In *Goldwater v. Carter*, *supra*, this court's most recent opinion regarding congressional standing, legislator plaintiffs were again granted standing despite the presence of adequate collegial remedies. The plaintiffs in the *Goldwater*

case were a small group of senators and representatives who asserted that President Carter could not terminate the Mutual Defense Treaty with Taiwan without either a two-thirds vote of the Senate or a majority of both houses of Congress. A majority of this court reasoned that the plaintiffs had been "disenfranchised" by the President's action because a requisite number of senators could never force an unwilling Senate to vote on a declaration of their right to block rescission of the Taiwan Treaty, nor was there any assurance that the President would heed any Senate action. 617 F.2d at 702-703. Yet collegial remedies existed because Senate resolutions regarding the Treaty were pending at the time. McGowan, at 247-48. On appeal the Supreme Court vacated our judgment on the grounds that the plaintiffs did not pose a justiciable question. 444 U.S. 996 (1979) (*mem.*) The Court ignored the standing concept altogether and, in separate opinions by Justices Powell and Rehnquist, neither of which gained a majority of the Court, relied upon the doctrines of ripeness and political question, respectively. *Id.* at 997, 1002.

If, as the ultimate disposition of *Goldwater v. Carter* suggests, the Supreme Court does not believe that the standing doctrine is capable of reflecting the prudential concerns raised by congressional plaintiff suits, this court ought not persist in the attempt to make it do so. The doctrinal difficulties presented by an attempt to reconcile our denial of congressional standing in the *Public Citizen*, *Harrington*, and *Reuss* cases, on the one hand, with our conferral of legislator standing in the *Kennedy* and *Goldwater* cases, on the other, suggest that

> [t]he use of the standing doctrine to address the separation-of-powers concerns arising when federal legislators sue the executive branch in federal court is fraught with difficulties both in theory and in application. Although it has been the most popular

> method of judicial self-restraint in these cases, the recent Supreme Court decision in *Goldwater*, which made no use of the term, suggests that its day may have passed insofar as these lawsuits are concerned.

McGowan, at 256. Moreover, we are convinced that the doctrines of ripeness and political question are no "more elegant in their conception [n]or more satisfying in their execution" than the standing concept as a means of articulating our prudential concerns in congressional plaintiff cases. McGowan, at 256-261. The political question doctrine justifies a finding of nonjusticiability primarily when there is an explicit textual commitment of the controversy to a non-judicial branch of government for resolution. *Id.* at 258. In the case under review, the Appointments Clause of the Constitution has no such textual commitment of the advice and consent issue exclusively to the legislature.[8] On the contrary, "[n]othing in articles II or III [of the Constitution] suggests that, assuming the court has jurisdiction, anyone but the judicial branch should decide this question." McGowan, at 258. In short, a clear constitutional or statutory prohibition of judicial review will surely not be present in many cases where prudential concerns nevertheless warrant a court in finding it improper for a congressional plaintiff to invoke the judicial power. As to ripeness, one can

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[8] The Appointments Clause of the Constitution, Art. II, sec. 2, cl. 2, reads as follows:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, and other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

conceive of instances when executive action has been taken which may create a situation ripe for judicial review (this case, for example), but separation-of-powers concerns justify judicial restraint. Neither the ripeness nor political question doctrine, in summary, is sufficiently catholic in formulation or flexible in application to resolve the prudential issues arising in congressional plaintiff cases.

The most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion. Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action. For the reasons set forth below, this test avoids the problems engendered by the doctrines of standing, political question, and ripeness. The standard would counsel the courts to refrain from hearing cases which represent the most obvious intrusion by the judiciary into the legislative arena: challenges concerning congressional action or inaction regarding legislation. Yet this standard would assure that non-frivolous claims of unconstitutional action which could only be brought by members of Congress will be reviewed on the merits.

The above standard would counsel dismissal of a congressional plaintiff's claim in cases concerning legislative action or inaction because it is in these cases that the plaintiff's dispute appears to be primarily with his fellow legislators. In these circumstances, separation-of-powers concerns are most acute. Judges are presented not with a chance to mediate between two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking. "This meddling with the internal decisionmaking processes of one of the

political branches extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power." McGowan, at 251. *See, e.g., Harrington v. Bush, supra* at 215; *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). Thus, where a congressional plaintiff has standing to challenge the actions of those acting pursuant to a statute which could be repealed or amended by his colleagues, or where he alleges an injury which could be substantially cured by legislative action, our standard would counsel judicial restraint. In all such cases, it is unlikely that an unconstitutional action or statute would go unreviewed. While we discourage congressional plaintiffs in such circumstances, it is probable that a private plaintiff could acquire standing to raise the issue of unconstitutionality before a court. Because such a private plaintiff's suit would not raise separation-of-powers concerns, the court would be obliged to reach the merits of the claim. In this case, for example, although prudential considerations warrant the dismissal of Senator Riegle's claim, one can easily conceive of a private plaintiff who could acquire standing to bring a similar claim. A person with significant economic interests in the open securities markets and prime lending rates, *e.g.*, a major corporation, pension fund, or other major investor, might qualify for standing to challenge the constitutionality of a procedure which allegedly permits improperly appointed officials to so substantially influence the monetary policy of the United States, open market trading, and prime rates.

When a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available *or* a private plaintiff would likely not qualify for standing, the court would be counseled under our standard to hear the case. Thus, such actions as impeachment, expulsion proceedings, impoundment, and certain acts of the executive not subject to direct legislative redress or private party challenge (*e.g.*, the pocket veto in *Kennedy v.*

Sampson, supra) would be subject to judicial review in a congressional plaintiff case. These circumstances (which are not intended to exhaust the possibilities) represent situations where absent congresisonal plaintiff actions, it is possible that non-frivolous claims of unconstitutional action would go unreviewed by a court.

In short, our standard would counsel dismissal of congressional plaintiff actions only in cases in which (i) the plaintiff lacks standing under the traditional tests, or (ii) the plaintiff has standing but could get legislative redress and a similar action could be brought by a private plaintiff. Nondiscriminatory application of standing principles warrants dismissal of the action in the former circumstance; non-interference in the legislative process counsels dismissal in the latter situation. We would welcome congressional plaintiff actions involving non-frivolous claims of unconstitutional action which, because they could not be brought by a private plaintiff and are not subject to legislative redress, would go unreviewed unless brought by a legislative plaintiff. In this last situation, there are no prudential considerations or separation-of-powers concerns which would outweigh the mandate of the federal courts to "say what the law is". *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

In this case there can be no doubt that Senator Riegle's congressional colleagues are capable of affording him substantial relief. Indeed, a bill which would accomplish Senator Riegle's objective was introduced in Congress as recently as 1980. *See* note 4 *supra*. The Senator remains free to attempt to persuade his fellow legislators of the wisdom of his views. His colleagues, if so persuaded, are empowered to redress the alleged inadequacies of 12 U.S.C. § 263(a) of the Act through amending legislation. Senator Riegle's attempt to prohibit voting by the five Reserve Bank members of the FOMC is yet another skirmish in the war over public versus private control

of the Committee which has been waged in the legislative arena since 1933. It would be unwise to permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle.

Assuming that the current procedure for constituting the FOMC may be unconstitutional, we must nevertheless weigh the danger of permitting such a statute to stand against two countervailing concerns: (1) the potential for misuse of the judicial system inherent in hearing a case brought by this particular plaintiff, who, because of his congressional status, has adequate collegial remedies; and (2) the unwarranted interference in the legislative process which judicial action would represent at this time. We conclude that rendering a decision on the merits in this case would pose a greater threat to the constitutional system than would the principled exercise of judicial restraint. As Judge Gesell perceptively recognized, we should not "improperly interfere with the legislative process." 84 F.R.D., *supra* at 116.

We hold that Senator Riegle has standing to bring this action but exercise our equitable discretion to dismiss the case on the ground that judicial action would improperly interfere with the legislative process.

The judgment dismissing the complaint is

Affirmed.

Motion to Dismiss or Affirm

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No. 81-186

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES A. MCCLURE, UNITED STATES SENATOR, APPELLANT

v.

RONALD REAGAN, PRESIDENT OF THE UNITED STATES, AND ABNER J. MIKVA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

MOTION OF THE APPELLEES TO DISMISS OR AFFIRM

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. 1253 and Section 101(c) of Pub. L. No. 96-86, 93 Stat. 657, to consider an appeal from an order of a three-judge district court dismissing an action on standing grounds.

2. Whether appellant, a United States Senator, has standing to challenge the appointment of a federal judge as violating the Ineligibility Clause of the Constitution, Article I, Section 6, Clause 2.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-186

JAMES A. McCLURE, UNITED STATES SENATOR, APPELLANT

v.

RONALD REAGAN, PRESIDENT OF THE UNITED STATES, AND ABNER J. MIKVA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

MOTION OF THE APPELLEES TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the appellees, moves that this appeal be dismissed or, in the alternative, that the judgment of the three-judge district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-13a) is not yet reported.

JURISDICTION

The judgment of the district court was entered on May 5, 1981 (J.S. App. 14a). A notice of appeal was filed on June 9, 1981 (J.S. App. 15a). The jurisdictional statement was filed on July 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and Section 101(c) of Pub. L. No. 96-86, 93 Stat. 657.

STATEMENT

Appellant, a United States Senator from Idaho, asserts that the district court erred in denying him standing to claim that the appointment of appellee Mikva to be a judge of the United States Court of Appeals for the District of Columbia Circuit violated the Ineligibility Clause of the Constitution, Article I, Section 6, Clause 2.[1]

Appellee Mikva was a member of the House of Representatives in May 1979, when President Carter nominated him to be a judge of the District of Columbia Circuit. During the Senate debate on the nomination, which took place on September 25, 1979 (125 Cong. Rec. S13342-13362 (daily ed.)), appellant and several other senators attacked Representative Mikva's qualifications and political, social, and philosophical views, and also argued that his appointment violated the Ineligibility Clause (J.S. App. 4a-5a & n.5). The basis of this argument was that on August 31, 1979, President Carter had determined the amount—subject to congressional revision or disapproval—of a judicial salary increase that was, under the terms of statutes passed during previous Congresses, to go into effect automatically on October 1, 1979. See J.S. 4-6; *United States* v. *Will*, 449 U.S. 200, 203-205 (1980). Despite these arguments and the dissenting votes of appellant and others, the Senate consented to the appointment, and on September 26, 1979, Judge Mikva took office (J.S. App. 3a n.4, 5a).

On October 12, 1979, Congress enacted Pub. L. No. 96-86, 93 Stat. 656, an appropriations act, which included a rider (Section 101(c)) providing in part:

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[1]The Ineligibility Clause provides in part:

> No Senator of Representative shall during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; * * *.

(1) Any member of Congress, whether he voted to confirm or not to confirm the appointment of any judge appointed during the 96th Congress to the United States Court of Appeals for the District of Columbia [Circuit], or whether he abstained from, or was not present for such vote, may bring a civil action in the United States District Court for the District of Columbia or in any United States District Court in the State he represents to contest the constitutionality of the appointment and continuance in office of said Circuit Judge on the ground that such appointment and continuance in office is in violation of Article I, section 6, clause 2 of the Constitution;

(2) The designated United States District Courts shall have exclusive jurisdiction, without regard to the sum or value of the matter in controversy, to determine the validity of such appointment and continuance in office;

(3) Any action brought under this section shall be heard and determined by a panel of three judges in accordance with the provisions of section 2284 of title 28, United States Code. Any appeal from the action of a court convened pursuant to such section shall lie to the Supreme Court; and

(4) Any judge designated to hear any action brought under this section shall cause such action to be in every way expedited.

As the district court noted, "[p]erhaps not coincidentally, the only judicial appointment that fits within the statute's limitations and might be subject to challenge on Ineligibility Clause grounds is that of [Judge] Mikva. * * * In short, what the statute appears to authorize is a mechanism whereby a senator or member of the House of Representatives may challenge in a federal court in his or her home state the

validity of the judicial appointment of a single person, Judge Mikva" (J.S. App. 5a-6a).

In November 1979, appellant sued President Carter and Judge Mikva in the United States District Court for the District of Idaho, alleging jurisdiction under 28 U.S.C. 1331 and 2201, and additionally under Section 101(c) of Pub. L. No. 96-86, 93 Stat. 657 (J.S. App. 3a-4a n.4).[2] He sought orders directing the President to notify Judge Mikva that his appointment violated the Constitution and "notify[ing] [Judge] Mikva that his appointment was void *ab initio* and that he must vacate his office" (J.S. Ap. 2a-3a).

A three-judge district court dismissed the complaint for lack of subject-matter jurisdiction (J.S. 13a),[3] holding that appellant did not have standing to sue. The court reasoned that, leaving aside Section 101(c), *Ex parte Le'vitt*, 302 U.S. 633 (1937), barred appellant from suing as a citizen, and that appellant's position as a senator did not entitle him to sue because " 'the effectiveness of [his] vote[]' " was not impaired (J.S. App. 9a-10a, quoting *Coleman* v. *Miller*, 307 U.S. 433, 438 (1939)). The court explained (J.S. 11a; footnote omitted):

> It is difficult to see how [appellant] can argue that the effectiveness of his vote is impaired by the appointment of former-Congressman Mikva to the federal bench. [Appellant] had the opportunity to persuade his colleagues to vote against the confirmation and, * * * did just that. That he and like-minded senators did not

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[2]Appellant first brought suit against the President and the Secretary of the Senate in the District of Idaho on September 25, 1979. In November 1979 appellant dismissed the Secretary of the Senate as a defendant and amended his complaint to name Judge Mikva and assert jurisdiction under Section 101(c) (J.S. App. 3a n.4).

[3]Judge Mikva reserved, and the court did not reach, the defense of lack of personal jurisdiction (J.S. App. 4a n.4, 13a n.9).

> prevail in the Senate does not mean that the effectiveness of [appellant's] vote was impaired * * *. It means merely that he was on the losing side. Certainly no one would contend * * * that the losing senators in any vote should automatically have the right to appeal to a federal court for a determination of the correctness of the result approved by the majority of their colleagues.

The court then considered Section 101(c) and ruled that it did not overcome these barriers to appellant's standing (J.S. App. 12a), noting that Section 101(c) "is not premised on protecting the effectiveness of a legislator's vote * * * for it purports to grant standing to senators who voted for Judge Mikva as well as those who voted against him. Furthermore, the statute purports to grant standing to members of the House of Representatives, who had no vote on the appointment at all" (J.S. App. 12a).

ARGUMENT

1. There is a substantial question whether the Court has jurisdiction of this appeal. Section 101(c) of Pub. L. No. 96-86, 93 Stat. 658, specifies that this action was to be decided by a three-judge court "in accordance with the provisions of [28 U.S.C.] 2284," and adds that "[a]ny appeal from the action of a court convened pursuant to such section shall be to the Supreme Court." Direct appeals to the Supreme Court from three-judge district courts convened pursuant to 28 U.S.C. 2284 are authorized by 28 U.S.C. 1253. It is clear that "a direct appeal will lie to this Court under §1253 from the order of a three-judge federal court denying * * * relief only where such an order rests upon resolution of the merits of the constitutional claim presented below." *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975). In particular, under 28 U.S.C. 1253, an order dismissing a claim for lack of standing is appealable only to a court of appeals, not to this Court. *Gonzales* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974).

Strong arguments can be made in favor of applying the same rule to appeals of orders entered under Section 101(c). Such a rule would further "the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzales* v. *Automatic Employees Credit Union, supra*, 419 U.S. at 98. While the language of Section 101(c), on its face, permits appeal to this Court "from the action of" a three-judge court, the language of Section 1253 also appears to be unequivocal; it authorizes appeal "from an order granting or denying * * * an interlocutory or permanent injunction," without distinguishing denials not based on the merits.

The Court's principal reason for not entertaining an appeal from a decision by a three-judge court dismissing a complaint for lack of standing is that under 28 U.S.C. 2284, such an order may be entered by a single judge (*Gonzales* v. *Automatic Employees Credit Union, supra*, 419 U.S. at 100-101; footnote omitted):

> A three-judge court is not required where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts. See *Ex parte Poresky*, 290 U.S. 30, 31 [1933]. It is now well settled that * * * dissolution of a three-judge court, and dismissal of a complaint by a single judge are orders reviewable in the court of appeals, not here. If the three-judge court in the present case had dissolved itself on grounds that "standing" was absent, and had left subsequent dismissal of the complaint to a single judge, this Court would thus clearly have lacked appellate jurisdiction over both orders. The same would have been true if the dissolution and dismissal decisions had been made simultaneously, with the single judge merely adopting the action of a three-judge court. The locus of appellate review should not turn on such technical distinctions.

Since three-judge courts convened pursuant to Section 101(c) operate "in accordance with the provisions of" 28 U.S.C. 2284, the same reasoning applies here.[4] Consequently, it would appear that the Court should dismiss this appeal for lack of jurisdiction.

2. If the Court disagrees with our jurisdictional submission, then the judgment of the district court should be affirmed because, as we demonstrate below, appellant plainly lacks standing to challenge Judge Mikva's appointment.

In *Ex parte Le'vitt*, 302 U.S. 633 (1937), a member of the Bar of this Court moved to prevent Justice Black from serving as Associate Judge, alleging that Justice Black's appointment violated the Ineligibility Clause. The Court denied the motion on the basis of the "established principle that * * * to invoke the judicial power to determine the validity of executive or legislative action [a private individual] must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public" (*id.* at 634). The correctness of the result in *Le'vitt*, and the constitutional basis for the Court's holding, were expressly reaffirmed in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 219-220 (1974), and *United States* v. *Richardson*, 418 U.S. 166, 176-179 (1974). Appellant's claim is substantively identical to that rejected in *Le'vitt*.

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[4]Nothing in the legislative history of Section 101(c) contradicts this conclusion. Moreover, Section 101(c)(3) (93 Stat. 658), provides that an "appeal from the action of a court convened pursuant to *such* section" (emphasis added)—meaning 28 U.S.C. 2284—"shall lie to the Supreme Court." This suggests that Congress meant only to reenact the previously existing authority to appeal from the decisions of three-judge courts, presumably with the implied limitations on that authority recognized by this Court.

Appellant's status as a United States Senator does not sufficiently distinguish him from the movant in *Le'vitt*. In some cases, legislators have been allowed to sue to uphold the alleged institutional prerogatives of the body of which they are members. See, *e.g., Coleman* v. *Miller, supra; Kennedy* v. *Sampson*, 511 F. 2d 430 (D.C. Cir. 1974). But as the district court pointed out, it is difficult to see how appellant's prerogatives as a senator could have been impaired by Judge Mikva's appointment when the Senate consented to the appointment. Compare *Riegle* v. *Federal Open Market Committee*, 656 F. 2d 873 (D.C. Cir. 1981), petition for cert. pending, No. 81-398. Appellant does not claim that the Senate was somehow misled or that its vote was misconstrued. Appellant suggests that the law developed by the lower courts for determining the standing of a member of Congress is "unsettled" (J.S. 11), but however unsettled it may be, appellant cites no case in which a member of Congress was allowed standing, in that capacity, to attack an institutional action taken by the very body of which he is a member.

Appellant (J.S. 9-10) and amicus (Am. Br. 3-4)[5] nonetheless attempt to articulate specific injuries that appellant has suffered because he is a senator. Appellant asserts that both he and the Senate have been "denied * * * the opportunity to exercise [the] constitutional duty * * * to advise and consent to the appointment of a constitutionally qualified nominee" (J.S. 9) and that he "was forced to cast his vote against [Judge] Mikva to prevent an unconstitutional appointment, thus nullifying his constitutional right to advise and consent to the appointment of a nominee based

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[5]"Am. Br." refers to the brief of amicus curiae Washington Legal Foundation.

solely on the nominee's qualifications to perform judicial functions" (J.S. 10). But there is no such "constitutional right"; the Constitution does not entitle members of Congress to avoid the obligation of voting on the basis of constitutional principles, instead of political considerations, when their constitutional judgment differs from the President's. If the interest alleged by appellant were sufficient to confer standing, any member of Congress could raise a constitutional challenge—presumably even before passage—to any legislative proposal made by the President or, perhaps, by a fellow member of Congress. Appellant suggests no basis for such a radical reordering of the constitutional scheme.

Similarly, appellant asserts that Judge Mikva's appointment injured the Senate and its members because legislation passed by the Senate will be "interpreted and possibly held unconstitutional by an unqualified person" (J.S. 9). But a legislator's interest in having a statute or the Constitution interpreted correctly has never been thought sufficient to confer standing. Moreover, many members of the public can confidently predict that they, too, will be affected by decisions in which Judge Mikva participates—or, for that matter, by decisions made by Congress or the executive—but there is no reason to suppose that the holding in *Le'vitt* was limited to persons unlikely to be affected by any decision in which Justice Black participated, or that members of the public should be allowed to challenge the qualifications of the members of the other branches of government.

Finally, appellant asserts that he was injured because Judge Mikva's appointment "suggests the presence of the very collusion the [Ineligibility Clause] was designed to prevent" (J.S. 9-10). Appellant does not demonstrate how the alleged collusion might injure either him or the Senate; his argument appears to be that the Ineligibility Clause is

intended to prevent not only collusion but the "suggest[ion]" or appearance of collusion. Even granting this dubious premise, appellant does not explain why *he* has been injured. He does not show why he should be allowed to assert the Senate's interest in being free of an appearance of collusion allegedly caused by the Senate's own action, nor why the Ineligibility Clause gives him a personal right to be free of any "stigma" (Am. Br. 4) associated with the Senate. Even if the Clause does give him such a right, a legislator ordinarily disassociates himself from an action that he believes will discredit the body of which he is a member by casting a dissenting vote. Appellant suggests no reason for believing that that means of avoiding a taint was insufficient in this case.

3. Appellant (J.S. 13-15) and amicus (Am. Br. 3-7) also assert that appellant has standing by virtue of Section 101(c) of Pub. L. No. 96-86. But as they recognize (J.S. 13; Am. Br. 7), Congress may not confer standing on a party who lacks standing under Article III. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979).[6] While the Court has suggested that Congress may eliminate prudential constraints by extending standing even to those who allege an injury " 'shared in substantially equal measure by all or a large class of citizens' " (*Gladstone, Realtors* v. *Village of Bellwood, supra*, 441 U.S. at 100, quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)), it remains clear that "a mere 'interest in a problem' " is insufficient to confer standing; a plaintiff must show more than a desire to see legal wrongs corrected. See *Sierra Club* v. *Morton*, 405 U.S. 727, 739-740 (1972). Article III requires a "palpable"

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[6] As noted above, in *Schlesinger* v. *Reservists Committee to Stop the War, supra*, 418 U.S. at 220-221, and *United States* v. *Richardson, supra*, 418 U.S. at 178, the Court made it clear that the limitation on standing specified in *Ex parte Levitt* was imposed by Article III.

injury, not merely an ideological one. See *Warth* v. *Seldin*, *supra*, 422 U.S. at 501. See also *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S. at 110-111, 114-115 (detailing social, professional and economic injuries to establish standing under Article III).[7]

Appellant has failed to show any palpable injury to himself. As we explained above, appellant cannot allege any personal injury deriving from the impairment of the Senate's institutional prerogatives. At most, appellant's injuries consist in his displeasure at having to cast a negative vote for constitutional, as opposed to non-constitutional, reasons, and at being a member of an institution that allegedly violated the Constitution. No such injury has ever been held by this Court to be sufficient to satisfy Article III. Moreover, to recognize such "injuries" would essentially allow any member of Congress to obtain a constitutional decision on any legislative action. Appellant advances no reason for believing that Article III was intended to permit such a result.

4. Appellant's substantive claim is also plainly without merit; this is an additional reason for the Court to affirm the district court's judgment. The mechanism by which Judge Mikva's salary was increased is described in the Court's opinion in *United States* v. *Will*, *supra*, 449 U.S. at 203-205, 208-209. Essentially, the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419,

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[7]Amicus cites an array of statutes containing broad grants of standing (Am. Br. 4-7), but the Court has consistently interpreted these statutes to contain the limitations imposed by Article III. See, *e.g.*, *California Medical Association* v. *Federal Election Commission*, No. 79-1952 (June 26, 1981), slip op. 4 n.6, cited at Am. Br. 6. Moreover, the statutes cited by amicus authorize "any person" to seek redress of a *statutory* violation. In such cases, Congress has created the legal right and accordingly has more latitude to define the class of persons aggrieved by a violation of that right. Appellant, by contrast, seeks to enforce a *constitutional* provision.

enacted in 1975, provides (see 28 U.S.C. 461) that the salaries of federal judges are subject to an annual adjustment equal to the average percentage cost-of-living adjustment made in General Schedule pay rates pursuant to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301, 5305-5308. This adjustment is recommended by an agent designated by the President to compare the GS rates "with the rates of pay for the same levels of work in private enterprise * * *." 5 U.S.C. 5305(a)(1)(A). The President may, however, submit an alternative plan for adjusting the salaries in view of economic conditions or national emergency. 5 U.S.C. 5305(c)(1). If he does so, he must submit that alternative plan to Congress by September 1 of the year in which it is to become effective; unless it is overridden by Congress, it becomes effective on October 1. See 5 U.S.C. 5305(c).

In 1979, the President's agent recommended an average increase of 10.41%. On August 31, President Carter reduced the proposed increase to 7% (*United States* v. *Will, supra*, 449 U.S. at 208-209; J.S. 6). When Congress did not disapprove the President's proposal, this increase took effect on October 1—after Judge Mikva's appointment.

The Ineligibility Clause provides that no member of Congress "shall * * * be appointed" to an office the emoluments of which "shall have been encreased" during the member's term; by using the future tense in referring to the appointment and the future perfect tense in referring to the increase, the Framers made clear their intention to prohibit only appointments that followed increases. Appellant appears to concede this point, arguing instead (J.S. 6-7) that President Carter's action on August 31 increased the salary of the position to which Judge Mikva was appointed. But in deciding the analogous question[8] of whether a reduction in

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[8]Appellant also treats it as analogous, but he cites (J.S. 7) the discredited (see *United States* v. *Will, supra*, 449 U.S. at 227 n.31) case of *Miles* v. *Graham*, 268 U.S. 501 (1925).

the adjustment of a federal judge's salary, prior to the effective date of the adjustment, violates the Compensation Clause of Article III, Section 1, this Court recently held that "a salary increase 'vests' * * * only when it takes effect as part of the compensation due and payable * * *." *United States* v. *Will, supra*, 449 U.S. at 229. In Judge Mikva's case, therefore, the increase did not "vest" until October 1, 1979 (see *id.* at 208, 229). Until that time, there was only a proposed increase that Congress was free to deny.

The Executive Branch has consistently taken the position that a proposed salary increase that Congress may disapprove is not an increase within the meaning of the Ineligibility Clause. See 42 Op. Att'y Gen. 381 (1969). Indeed, it is paradoxical to argue that President Carter's action, which *decreased* the salary that Judge Mikva would otherwise have received, nonetheless "encreased" it for purposes of the Ineligibility Clause. Appellant does not suggest that the action of the President's agent—who was carrying out a statutory mandate and whose recommendation never took effect—increased Judge Mikva's salary. Thus, even if a proposed increase does fall within the Ineligibility Clause, the source of the increase in this case would be a statute passed in 1975—before the term Representative Mikva was serving when he was appointed to the court, and therefore outside the scope of the Ineligibility Clause.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. If the Court concludes that the appeal is proper, the judgment of the district court should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1981

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Appellant's Reply Brief

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Appellees.

On Appeal from the District Court for the District of Idaho

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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On Appeal from the District Court for the District of Idaho

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.4 Appellant submits this brief opposing Appellees' motion to dismiss or affirm.

JURISDICTION

Appellant claimed jurisdiction under Title 28 United States Code Sections 1331 and 2201 and Section 101(c) of Public Law 96-86, 93 STAT. 656, set out in full in Appellant's Jurisdictional Statement at p. 2. Section 101 (c)(3) provides that any case brought pursuant to its provisions "be heard and determined by a panel of three judges in accordance with the provisions of Section 2284 of Title 28, United States Code," and that "any appeal" from such three-judge panel "shall lie to the Supreme Court." Appellant did not, contrary to Appellees' assertion, invoke Title 28 U.S. Code § 1253, as a jurisdictional basis for this appeal. Such an erroneous assertion is an attempt to direct the Court's attention away from

the issues involved in the jurisdictional predicate actually invoked by Appellant and to provide a basis for an inapposite request that the Court apply the rationale in *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974) to Section 101(c) of P.L. 96-86.

Appellees' contention is, nonetheless, frivolous since the very language of Title 28 United States Code Section 1253—"Except as otherwise provided by law, any party may appeal to the Supreme Court . . ."—precludes it being a bar to a direct appeal to this Court. Section 101(c)(3), which Appellant did invoke, provides that *any* appeal *shall* lie to the Supreme Court. This language thus clearly fits within the exception provided for by Section 1253. In addition, Section 101(c)(4) of Public Law 96-86, providing that "any judge designated to hear any action brought under this section shall cause such action to be in every way expedited," demonstrates a clear congressional mandate that this matter be expedited and heard by this Court without first going to the court of appeals. In sum, the specific provisions of Section 101(c) of Public Law 96-86, rather than the general provisions of Section 1253, govern this appeal.

Apparently recognizing later in its brief that Appellant has not invoked Section 1253, Appellees suggest that "[s]trong arguments can be made in favor of applying the [*Gonzales*] rule to appeals of orders entered under Section 101(c)." Appellees' Motion at 6. The *Gonzales* case is inapplicable because its underlying rationale was a determination by the Court that the purpose of statutes convening three-judge panels was to save state and federal statutes from "doom" at the hands of one federal district court judge. 419 U.S. at 97. Since a determination of standing was not related to the subject matter which authorized the empanelling of a three-judge court, the Court decided that the appeal should be to the Court of Appeals. Unlike the statute in *Gonzales*, however,

Section 101(c) has as its very purpose the expedited judicial review of an action of the executive branch; therefore, unlike Section 1253, which provides that . . . "any party may appeal to the Supreme Court . . .", Section 101(c) provides that "any appeal" shall lie to the Supreme Court.

This distinction was emphasized by this Court in *NAACP v. State of New York*, 413 U.S. 345 (1973), an action brought pursuant to the Voting Rights Act of 1965 which provided that its cases be heard by a three-judge panel, and that "any appeal shall lie to the Supreme Court." Voting Rights Act of 1965, Pub. L. 89-110, 79 STAT. 438, as amended, 42 U.S.C. § 1973b(a). In the original action, the State of New York filed suit against the United States. The NAACP then moved to intervene, and its motion was denied; at the same time, the State of New York's motion for summary judgment was granted. The NAACP appealed the denial of its motion to intervene directly to this Court. The Court, upon reviewing the Voting Rights Act and determining Congress' intent that decisions in voting rights cases were to be expedited, held that the intervenor's appeal was directly to the Supreme Court. 413 U.S. at 354-355. In reaching its conclusion, the Court compared the language of 28 U.S.C. § 1253 with Section 4(a), of the Voting Rights Act which relates to "any appeal" as opposed to § 1253 which relates only to "any party". Noting that Section 4(a) did not incorporate or refer to § 1253, the Court concluded "The difference is obvious, and the broader import of Congress under § 4(a) is manifest." 413 U.S. at 356. Since Section 101(c) does not refer to § 1253 and the language authorizing this appeal is identical to the language in § 4(a) of the Voting Rights Act, the logic of the Court in *NAACP v. State of New York*, *supra*, must prevail here, and a direct appeal to this Court be allowed.

STANDING

Appellees have, throughout their discussion of this case, misconstrued the subject of Appellant's action. That is, Appellees incorrectly think Appellant's action is against his colleagues in the Senate for advising and consenting to the appointemnt of a constitutionally ineligible nominee. Moreover, Appellant's action is not, contrary to Appellees' assertion, a challenge to a legislative proposal made by the President or a fellow member of Congress. Rather, Appellant challenges an executive action; his action is against the President who nominated and appointed a constitutionally ineligible person, and against the appointee who benefited from that appointment. Appellees attempt to explain why the Appellant's injuries are not adequate to confer standing by noting Appellant's failure to cite cases in support of his position. Yet Appellees cite no case law supporting their rejection of Appellant's specific injuries. This lack of substantial case law in this area underscores Appellant's contention that this area of the law is unsettled.

Appellees incorrectly contend Appellant had no constitutional right to advise and consent to the appointment of a constitutionally eligible nominee for circuit judge and, thus did not suffer an injury even though the President may have violated the Constitution. This is merely a bald assertion by Appellees that the President's unconstitutional acts are not reviewable by the judicial branch. If the Court finds Appellant has standing there would be no radical reordering of the constitutional scheme as Appellees claim at p. 9 of their motion; rather, the Court would be in a position to carry out its constitutional duty of being the ultimate arbiter of the Constitution.[1]

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[1] In th .n, it should be noted that Appellant has not contended that "the Constitution does not entitle members of Congress to avoid the obligation of voting on constitutional principles, instead of political considerations, when their constitutional judgment

Appellees assert that Appellant does not have standing based on his interest in avoiding interpretation of laws by an unqualified person because "many members of the public can confidently predict that they, too, will be affected by decisions in which Judge Mikva participates. . ." Appellees' Motion at 9. Such an assertion entirely miscomprehends the distinction between Appellant, a United States Senator, and a member of the public. Members of the public are not granted, by the Constitution, the authority to enact legislation; thus, while they may have an interest in the interpretation of legislation, they do not occupy the same position as a United States Senator with express constitutional duties. *Ex Parte Levitt*, 302 U.S. 633 (1937) is, therefore, not controlling in this case because Appellant has alleged injuries not "common to the public." 302 U.S. at 633.

As Appellant indicated in its Jurisdictional Statement both the Legislative Branch and the Executive Branch recognized, in enacting and signing P.L. 96-86, the possible constitutional infirmity in the appointment of Judge Mikva. Thus, if the Court decides this case, it need not fear that it will establish a precedent authorizing any member of Congress to seek constitutional review of any legislative action, as Appellees suggest at p. 11 of their brief. Such suggestion is an overreaction and an attempt to divert the Court's attention in this case from the specific injuries and narrow issues to generalized issues of review of legislative actions.

MERITS

Appellees assert that because Appellant's claim is without merit that it should be dismissed for lack of standing. Appellant did not choose to argue the merits of his case in the Jurisdictional Statement but now feels compelled to respond.

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differs from the Presidents." Appellees' Motion at 9. Rather, Appellant only asks that the judicial branch be the final interpreter of the Constitution.

Appellees' explanations of the functioning of federal salary increases pursuant to the Federal Pay Comparability Act of 1970, and the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 STAT. 419, and the decision in *United States v. Will*, 449 U.S. 200 (1980) are inaccurate. At pages 2 and 12 of their motion Appellees state that the salary increase made by President Carter on August 31, 1979, pursuant to the foregoing salary laws, could be disapproved by Congress. In fact, pursuant to the Federal Pay Comparability Act, if either House of Congress disapproves of the salary adjustment as made by the President, then the higher rate recommended by the President's pay agent automatically becomes law. Therefore, when the President's agent recommended an average increase in rates of pay of 10.41%, and the President rejected that and adjusted federal salaries by 7%, one of the two increases was certain to become effective, *i.e.*, due and payable, on October 1, 1979. Had either House of Congress rejected the 7% increase, the President would have been required to readjust salary rates by 10.41%. One House of Congress could not, therefore, eliminate the federal salary increase made by the President, but could only increase the percentage to 10.41%; thus, after August 31, 1979 the pay increase was not a proposal that Congress was free to deny.

In *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) the court held that under the present federal salary laws, the President's actions are mandatory and non-discretionary, *i.e.*, he must adjust federal pay in accordance with the increase proposed by his pay agent, or pursuant to an alternative plan. In the instant case, neither House of Congress took any action, and although the increase was not effective until October 1, 1979 the 7% increase became law at midnight on August 31, 1979.

The Department of Justice, Office of Legal Counsel supports the foregoing view that distinguishes the date

of enactment or the date an increase becomes law, from its effective date. In a memorandum opinion the Office of Legal Counsel concluded that "the phrase 'shall have been increased in the Constitutional provision [Article I, Section 6, Clause 2] refers to enactment of the increase rather than its entering into effect," [2] *Memorandum of November 22, 1974 from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, to Hugh M. Durham, Office of Legislative Affairs*, app. 4a).

Appellees, in an attempt to support their position with regard to the date of enactment of salary increases, cite an Opinion of the Attorney General, 42 Op. Att'y. Gen. 381 (1969), for the proposition "that a *proposed* salary increase that Congress may disapprove is not an increase within the meaning of the Ineligibility Clause" (emphasis added). Appellees' Motion at 13. However, the salary laws then in effect and being construed by the Attorney General were quite different than those in the instant case.

Under the federal salary laws in effect at that time, the President had the option of deciding whether to propose a pay increase. In addition, if he did propose an increase, it could be disapproved by either House of Congress prior to its effective date and no increase would occur, whereas under the current federal salary scheme, a rejection of the President's adjustment would result in the President's being mandated to *readjust* federal salaries by the percentage recommended by his pay agent. Thus, Attorney General Clark concluded, correctly, that under the salary laws in force, "the salaries in question will not 'have been increased' within the meaning of the Constitutional prohibition so long as

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[2] In the context of its opinion, it is clear that the Office of the Legal Counsel's use of the term "enactment" means the date an increase occurs or becomes law, not the date the mechanism authorizing the increase was enacted.

Congress may still exercise its power of disapproval." (42 Ops. Att'y Gen. at 382), clearly not a possibility here since, under current law, congressional rejection of the President's proposal results in a higher percentage increase.

Appellees are also incorrect in concluding that because the source of the increase in this case "would be a statute passed in 1975—before the term Representative Mikva was serving when he was appointed to the court. . ." that the increase in Judge Mikva's salary is "outside the scope of the Ineligibility Clause." Appellees' Motion at 13. The Ineligibility Clause, by its plain language, is concerned with appointments and increases in emoluments during the term for which a member of Congress was elected; it matters not that the mechanism authorizing the increase preceded the term for which a member was elected.

Appellees' citation of *United States v. Will*, 449 U.S. 200 (1980) for the proposition that the effective date of a salary increase is the date it is due and payable is inapplicable under the facts of this case. In *Will* the Court considered Article III, Section I of the Constitution, the Compensation Clause, in the context of the Federal Salary Act of 1967 (2 U.S.C. § 351-361), the Federal Pay Comparability Act of 1970 (5 U.S.C. § 5305 *et seq.*), and the Executive Salary Cost-of-Living Adjustment Act (28 U.S.C. § 461). It did not construe Article I, Section 6, Clause 2 of the Constitution, the Ineligibility Clause. The Court determined that "a salary increase 'vests' for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges." 449 U.S. at 229. The Court did not explicitly determine when, for purposes of the Ineligibility Clause, an increase in emoluments occurred pursuant to the scheme embodied in the current federal salary acts because it was un-

necessary to do so in construing the Compensation Clause.

The Court did, however, implicitly recognize that federal salary increases had occurred and became law prior to the October 1 effective date of the increases. This is evident from the Court's description of the actions taken by Congress with regard to salary increases in the four years covered by the *Will* decision. The Court stated:

> In four consecutive fiscal years, Congress, with respect to these high-level Executive Branch, legislative, and judicial salaries, enacted statutes to stop or reduce previously authorized cost-of-living increases initially intended to be automatically operative under that statutory scheme, once the Executive had determined the amount. 499 U.S. at 202-203.

The Court then commented on each year.

As to Year 1, when rates of pay were adjusted by 4.8% the import of the Legislative Branch Appropriation Act, 1977, "was to prohibit *paying* the 4.8% *raise* . . ." (emphasis added). 449 U.S. at 206.

As to Year 2, Congress acted to prevent the President from adjusting pay increases before August 31st.

As to Year 3, the Court noted that the effect of the Legislative Branch Appropriation Act of September 30, 1978, was "to prohibit *paying* the 5.5% *increase* authorized by the Adjustment Act for the fiscal year beginning October 1, 1978." (emphasis added). 449 U.S. at 208.

As to Year 4, the President, on August 31st, adjusted salaries by 7%. The Court noted, moreover, that the Act of September 30, 1978 dealing with Year 3 prohibited paying the 5.5% increase for Year 3 only for one fiscal year, and that therefore that increase took effect on October 1 of Year 4 along with the 7% increase as made by the President on August 31 of Year 4 (Year 4 is the year involved in the action); thus, as a result of

the Court's decision in *Will*, the office of circuit judge, on October 1, 1979, started to receive a 12.9% increase in its rate of pay.

This is an express recognition by the Court of the distinction between the date a salary increase occurs or becomes law and the date it is paid out or effective. For purposes of the Compensation Clause these increases became effective on October 1, 1979, but for purposes of the Ineligibility Clause, the adjustment of August 31, 1979 was an increase in emoluments whose date of enactment preceded, and thus barred Judge Mikva's appointment.

CONCLUSION

Plaintiff respectfully requests the Court to remand the case to the United States District Court for the District of Idaho for consideration of the merits, or, in the alternative, to set the case down for plenary review of the issue of standing and the separation of powers doctrine, or plenary review of the issue of standing, the separation of powers doctrine, and for consideration on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX

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Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Proposed bill to increase the salary of the Attorney General

Prior to the nomination of Senator William B. Saxbe to be Attorney General, a statute was enacted which reduced the salary and other emoluments of the Attorney General to those in effect on January 1, 1969. See Public Law 93-178 (December 10, 1973). You have orally requested our views on a proposed bill which would repeal that reduction, effective at noon, January 2, 1975.

The proposal raises two separate issues. Our conclusions are as follows: (1) Enactment of the proposed bill during the current term of Congress would not affect the legality of Mr. Saxbe's appointment or tenure. (2) Payment of the increased salary would apparently not be prohibited by Article I, section 6, clause 2 of the Constitution.

1. *Effect of proposal upon Mr. Saxbe's holding office*

Article I, section 6, clause 2 provides in part that:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time. . . .

We are unaware of any court decision construing this provision, although two suits challenging the constitutionality of Mr. Saxbe's appointment have been brought under section 2 of Public Law 93-178 and remain pending.[1]

It might be argued, in view of the language of the emoluments clause, that enactment during 1974 of an increase in the Attorney General's salary would have the effect of (retrospectively) invalidating Mr. Saxbe's appointment. This position is in our view unsound.

It is clear that the mere fact that the appointee was not a member of the Congress when the legislative change was effected will not prevent application of Article I, section 6, clause 2. *See* 17 Ops. A.G. 365 (1882) (attempted appointment of former Senator Kirkwood to the Tariff Commission, which was legislatively established after his resignation from the Senate). It would not be sound constitutional interpretation, however, to apply the provisions when the law in question is enacted not merely after the affected person's departure from the Congress but also after his appointment to the position in question.[2] Otherwise, in contravention of the President's power of removal, the Congress might, by the simple act of passing a pay raise, accomplish the removal of a former Congressman.

A similar conclusion follows from a strict grammatical reading of the language of the constitutional provision. By using the future tense when referring to the appointment ("no Senator or Representative shall . . . be

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[1] *Cardarett* v. *Saxbe*, Civ. Action no. 73-4289-M, D. Mass.; *Committee for Fair Play to Voters* v. *Saxbe*, Civ. Action No. 74 Civ943, S.D.N.Y.

[2] Of course this is only possible with respect to the "increase of emoluments" portion of Article I, section 6, clause 2, and not the "creation of office" portion, since a person cannot be appointed to an office before it has been created.

appointed") and the future perfect tense to refer to the emoluments ("the emoluments whereof shall have been encreased") the provision displays the intention of voiding the appointment only when the increase of emoluments precedes it.

Finally, the inability of this legislation to affect the Attorney General's appointment is supported by the course of action taken with respect to appointment of Secretary of Defense Laird and Attorney General McGrath. The 1969 Attorney General's opinion dealing with the former and the 1949 Office of Legal Counsel memorandum dealing with the latter concluded that Article I, section 6, clause 2 has no applicability whatever (much less any retroactively invalidating effect) in the case of post-appointment salary increases. Since the details of these cases are more relevant to the second point considered in this memorandum, discussion of them will be reserved for that section.

Of course, there may be situations involving actual collusion between Members of the Congress and the President to increase the emoluments of a particular post after one of the Members of Congress shall have been appointed to it. In such a case, where actual connection between the appointment and the subsequent increase can be shown, the emolument clause might possibly be held to render the appointment invalid, as having been infected with unconstitutionality from its inception. But at least absent such connection between the appointment and the increase, it is our firm view that Article I, section 6, clause 2, cannot be held retroactively to invalidate an appointment.

2. *Validity of the proposed bill*

Aside from the question whether the proposed legislation will invalidate Mr. Saxbe's appointment, there is the question whether the legislation itself is ineffective be-

cause it violates a prohibition implicit in Article I, section 6, clause 2. In our view, the salary increase is constitutionally permissible, although the matter is not as free of doubt as the point first discussed.

First of all, it might be well to eliminate an apparent misconception which the bill contains: The delay of its effectiveness until noon, January 2, 1975 is evidently intended to prevent any increase in salary with respect to the term for which Mr. Saxbe was elected to the Senate. It is not our view, however, that the 93d Congress expires at noon, January 2, 1975. The pertinent provisions of the Constitution, the Twentieth Amendment, and 2 U.S.C. section 1, appear to indicate that the dividing line is noon, January 3. This point does not seem to us conclusive of the bill's invalidity in its present form—both for the reasons set forth below and also because in our view the crucial factor is not the period *with respect to which* the salary is increased but rather the period *during which* the increase is voted by the Congress. That relevant period will be the term for which former Senator Saxbe was elected, whether or not the legislation has a January 3 effective date. The constitutional ban would apply, for example, if the present Congress were to vote a salary increase for a particular office effective next February, and if a present Representative were then appointed to the post before the current Congress expires. Or to put the point another way, the phrase "shall have been encreased" in the constitutional provision refers to the enactment of the increase rather than to its entering into effect. Nonetheless, since it is certainly arguable that this factor is relevant,[3] we strongly recommend that the effective date be changed to January 3, 1975.

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[3] *See*, for example, the testimony of Professor William Van Alstyne supporting enactment of Public Law 93-178, Hearing on S. 2673 before the Senate Judiciary Committee, 93d Cong., 1st Sess. (1973) pp. 59-60.

In support of the permissibility of the proposed legislation, the following points can be made:

(a) *The language of the constitutional provision*

Article I, section 6, clause 2 is directed against appointments, not increases in salary. The statute would not constitute any violation of the terms of the constitutional provision, since Attorney General Saxbe will not be appointed to any position for which the 93d Congress "shall have" (previously) enacted a salary increase (assuming, as we are for purposes of this memorandum, that section 1 of Public Law 93-178 avoided that outcome with respect to the 1969 increase). It should be noted that a rigid adherance to the technical language of the constitutional provision was adopted in the first Attorney General's opinion relating to it—the opinion discussed above dealing with the Kirkwood appointment. There Attorney General Brewster absolutely declined to "consider the question of the policy which occasioned this constitutional prohibition," finding that his decision "must be controlled exclusively by the positive terms of the provisions of the Constitution. The language is precise and clear . . . ." 17 Ops. A.G. at 366.

(b) *Earlier opinions of the Attorney General and the Office of Legal Counsel*

In 1969, Representative Melvin Laird asked Attorney General Clark for an opinion as to whether Mr. Laird's commencement of a term as Member of the House of Representatives for the 91st Congress would preclude his appointment as Secretary of Defense, in view of the possibility that the salary payable to the Secretary of Defense might be increased early in that session pursuant to section 225 of the

Federal Salary Act of 1967, 81 Stat. 642. Under the statutory plan of section 225, the President includes recommendations for salary increases in his budget message (which by law must be transmitted within the first 15 days of the session, 31 U.S.C. 11(a)); the recommendations become effective no earlier than 30 days following the transmittal in the budget message unless they are disapproved by Congress. Under the assumptions set forth in the opinion, Mr. Laird would have been a Member of the 91st Congress when the recommendations were transmitted, but Secretary of Defense when they became effective. On this basis (which is if anything less favorable than the fact situation here presented) Attorney General Clark concluded that the appointment would be valid, and apparently considered the salary increase valid as well. The crux of his opinion is that "the ban [of Article I, section 6, clause 2] clearly does not apply to an increase in compensation which is proposed subsequent to the appointment." We have no reason to believe that, after his appointment, Secretary Laird accepted anything less than the increased salary which the law provided; indeed, it would probably have been unlawful for him to do so. *MacMath* v. *United States*, 248 U.S. 151, 152 (1918). It is interesting to note that the salary increase at issue in the Laird case was precisely the one which prevented Mr. Saxbe's appointment in absence of Public Law 93-178. The only difference was that Mr. Laird's appointment preceded, whereas Mr. Saxbe's would have followed, the salary increase.

In August 1949, then Senator J. Howard McGrath was under consideration for appointment to be Attorney General. There was then pending in the Senate a pay raise bill which would have included that office. An OLC memorandum addressed to the issue

concluded (without substantial explanation other than the explicit terms of the Constitution):

> There can be no question that if Senator McGrath receives his appointment as Attorney General before the pending Executive Pay Bill becomes law, the Senator will be entitled not only to hold the office of Attorney General but also to receive any increase in pay that the Congress votes for that office.

Of course, Senator McGrath was appointed Attorney General in August of 1949. The pay raise bill was passed in October of that year, and Attorney General McGrath was in fact paid at the increased level.

In opposition to the validity of the present legislation, a respectable argument can be derived from the apparent purpose of the constitutional proscription. As pointed out in Assistant Attorney General Dixon's testimony on S. 2673 (which became Public Law 93-178), the purpose of the emoluments clause was to protect the public against the corruptive and spendthrift effects of executive-legislative collusion. It is clear from the language of the provision and its legislative history that the risk of collusion was seen to exist not merely while a legislator was still in the Congress, but also after he had left, until the term for which he was elected expired. It seems absurd to permit this post-service disability to be avoided by the simple device of having the former Member's colleagues vote the increase the day after, rather than the day before, his appointment is made. Accordingly, while the appointment itself may not be voided by such legislative action (since that would provide a dangerous device for legislative interference with the executive removal power) it is nevertheless reasonable to assert that such legislative action is fundamentally contrary to the purposes of Article I, section 6, clause 2, and therefore invalid.

I think the most effective answer to this policy argument is that the constitutional provision does not avoid some degree of absurdity in any event, no matter what imaginatively constructed extensions are devised; and that therefore it is best to restrict the provision to its clear, literal meaning. It is not apparent, for example, why the possibility of Mr. Saxbe's collusion with former colleagues should be less after the end of the last year of his assigned term (at which time one-third of his colleagues might be replaced) than it would have been at the end of the fourth year of his assigned term (at which time one-third of his colleagues might have been replaced). As for a means of easy evasion, nothing could be easier than having the Congress create a new post, to be filled by an existing appointee, and then appointing the favored Member to the vacated office. In light of the esential incohesiveness of the constitutional provision, I do not regard the policy argument set forth above—which assumes a well-thought-out arrangement—as persuasive. On balance, and particularly in light of the opinions and practice discussed above, I am inclined to read the Constitutional provision literally, and thus regard the present legislation as valid.

The counter argument must be weighed, however, in assessing the legislative prospects for the proposal. It unquestionably *appears* to do what the Constitution seems to disfavor. And though the same has been done before, the legislative climate is now drastically different. It is clear that unconstitutionality will be asserted by some members of Congress. During the hearings and the floor debate on Public Law 93-178, several persons, including proponents of the bill, expressed the view that an effort to increase Mr. Saxbe's salary after his appointment but before expiration of the Senate term for which he was elected would be an "evasion" of the emoluments clause and would be wholly or partly invalid.

See, e.g., Hearing on S. 2673 before the Senate Judiciary Committee, 93d Cong., 1st Sess. (1973) p. 60 (Professor William Van Alstyne): 119 Cong. Rec. S 21298 (daily ed., Nov. 28, 1973) (Senator Hart, a proponent); S 21279 (Senator Robert Byrd, an opponent).

I might also note that the proposed bill would leave intact section 2 of Public Law 93-178, authorizing civil suits to challenge the constitutionality of the Attorney General's "appointment and continuance in office." One of the factors which should be considered in deciding whether to seek the salary increase now, rather than in the 94th Congress, is the possibility of eliminating that troublesome provision if the latter course is adopted.

Amicus Brief

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No. 81-186

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JAMES A. McCLURE, United States Senator,
Appellant,
v.
JAMES EARL CARTER, President of the United States and ABNER J. MIKVA,
Appellee.

On Appeal from the District Court for the District of Idaho

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a nonprofit, tax-exempt public interest law firm organized and existing under the laws of the District of Columbia for the purpose of engaging in matters affecting the broad public interest. WLF has more than 80,000 members and supporters throughout the United States whose interests the Foundation represents.

The Washington Legal Foundation has appeared before this Court as *amicus curiae* on numerous occasions. Briefs

amicus curiae have been filed with and accepted by the Supreme Court in the following recent cases: *Williams v. Zbaraz*, 100 S. Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, —— U.S. ——, 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuel Company v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 322 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 323 (1979); *Federal Trade Commission v. Standard Oil Co. of California*, —— U.S. ——, 100 S. Ct. 62 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 49 U.S.L.W. 4306 (1981); *Rostker v. Goldberg*, 49 U.S.L.W. 4798 (1981); *Moody v. Forrester*, —— U.S. ——, 101 S. Ct. 1733 (1981); *First National Maintenance Corp. v. NLRB*, 49 U.S.L.W. 4762 (1981).

More specifically, WLF has litigated significant constitutional cases on behalf of Congressional plaintiffs in which standing was a key issue. *Goldwater v. Carter*, 444 U.S. 996 (1979); *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978).

WLF can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. WLF is concerned with the broader public interest issues not presently represented.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the statement of the case contained in Appellant's Jurisdictional Statement.

SUMMARY OF THE ARGUMENT

Amicus submits that the three-judge panel of the United States District Court for the District of Idaho erroneously decided that Senator James A. McClure lacked standing under the Act of October 12, 1979, Pub. L. No. 96-86 § 101(c), 93 Stat. 656 to challenge the appointment of former Congressman Abner J. Mikva to a position as a circuit judge for the United States Court of Appeals for the District of Columbia Circuit. This appeal raises substantial public interest issues for if the statute in question does not allow Senator McClure to bring this action, then a whole host of other federal statutes similarly providing plaintiffs with a right to vindicate the public interest through litigation will be seriously undermined.

Amicus further submits that the separation of powers doctrine does not foreclose judicial review of this case.

Accordingly, *amicus* submits that this case warrants plenary consideration by this Court.

ARGUMENT

I. Senator James A. McClure Has Standing to Bring This Action

In the opinion below, the three-judge court ruled that Senator James A. McClure lacked standing to bring this suit because he failed to suffer any injury by the appointment of Judge Mikva to the U.S. Court of Appeals, notwithstanding the jurisdictional statute giving him the right to do so.

Senator McClure has sufficiently alleged particularized injuries sufficient to confer standing. The Constitution clearly gives him and his colleagues the right to advise and consent in the appointment of constitutionally qualified judges to the federal branch. Article II, Section 2,

Clause 2. Furthermore, Senator McClure has alleged that laws for which he and his colleagues voted may be nullified by Judge Mikva, that he was and is unable to vote for or against a constitutionally eligible nominee for the United States Circuit Court of Appeals, and finally, that the violation of Article I, Section 6, Clause 2 continues to cast the stigma of collusion upon the legislative body that purportedly approved the nomination of Judge Mikva. Appellant's Jurisdictional Statement at 9-10. These interests certainly are not generalized grievances shared by the public at large and hence, the lower court's reliance on this Court's *per curiam* opinion in *Ex Parte Levitt*, 302 U.S. 633 (1937) is misplaced.

More importantly, these specialized interests were implicitly recognized by the Congress in its passage of the jurisdictional statute in question which allows Senator McClure and his colleagues to vindicate those interests in a court of law. The fact that those interests *could have been* vindicated in the past if a sufficient number of other Senators had joined Senator McClure in voting against Judge Mikva's nomination, for whatever reason, or, if Congressman Mikva had decided to withdraw his name from consideration, is wholly irrelevant for purposes of determining justiciability at this point.

The jurisdictional statute in question clearly gives Senator McClure the right to bring this action. As a constitutional scholar on the subject recognized:

> ". . . But any Article III-based requirement of factual or concrete injury serves only to limit the ability of federal courts to confer standing in the absence of statute; Article III has not been treated as limiting Congressional power to define categories of individuals or groups as parties sufficiently aggrieved by particular governmental actions to warrant federal judicial intervention at their behest. In effect, someone is 'injured in fact' by an action for purposes of

> Article III if the person has a statutory right to complain of the action in federal court. . . ."

L. Tribe, Constitutional Law § 3-18 at 80 (1978) (quoted with approval with emphasis in *Nat'l Treasury Employees' Union v. Campbell*, D.C. Cir. No. 80-1118 (dec. June 5, 1981), slip. op. at 9.)

And, as the court below correctly recognized, the statute has "an entirely salutary purpose, for it would be antithetical to the rule of law that all government officials, and judges in particular, are pledged to uphold if a federal judge were permitted to take office in violation of the express terms of the Constitution." (App. 6a) Yet, this salutary purpose is rendered meaningless by the court below and the viability of other federal statutes authorizing plaintiffs standing in certain actions is seriously undermined.

For example, the Clean Air Act, 42 U.S.C. § 7604 (Sup. II 1978) authorizes a suit by "any person" against the government, certain officials, and any person who "proposes to construct" a facility without a statutorily required permit. That person need not show that he has been injured by the actions of the defendants. Similarily, without regard as to injury, citizen suits are permitted and encouraged by Section 20 of the Toxic Substances Control Act (15 U.S.C. § 2619); Section 505 of the Federal Water Pollution Control Act (33 U.S.C. § 1366) and Section 7002 of the Resource Conservation and Recovery Act (42 U.S.C. § 6972).

The Federal Election Campaign Act of 1971, *as amended* (FECA) 2 U.S.C. § 431, *et seq.* also has provisions for citizen suits. 2 U.S.C. § 437g(a) allows "any person" to file a complaint with the Federal Election Campaign Act alleging that a person violated any provision of the FECA. That same person can seek judicial review of the FEC action on the complaint, 2 U.S.C.

§ 437g(a)(8) and the court, under certain circumstances, may even allow the individual to bring an action directly against the violator. 2 U.S.C. § 437g(a)(8)(C). There is no necessity that the complaint have any relationship or nexus with the respondent. For example, a person in Idaho can seek judicial review of a complaint filed against a candidate for Congress from Illinois.[1]

In addition to 2 U.S.C. § 437g(a)(8), 2 U.S.C. § 437h allows "any individual eligible to vote" to sue to determine the constitutionality "of any provision of this Act." *Id.* Such actions are to be heard by the United States Court of Appeals *en banc*, with direct appeal to the Supreme Court. *Id.* And this Court recently had no trouble rejecting the government's argument that appellants lack standing under Section 437h. *California Medical Association et al. v. Federal Election Commission*, 101 S.Ct. 2712 (June 26, 1981) at n. 6.

Furthermore, Chapter 95 of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.* also provides for a citizen suit in a manner similar to the one in the instant case. Specifically, 26 U.S.C. § 9011(b) provides that "the Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute" actions to "implement or construe any provisions of this chapter." The statute further provides the convening of a three-judge court with appeal to the Supreme Court. 26 U.S.C. § 9011(b)(2). An action under that provision was heard by a three-judge court and is now before this Court. *Common Cause v. Schmitt*, Nos. 80-847; 1067, 49 U.S.L.W. 3616.

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[1] Indeed, since Judge Mikva (and Senator McClure) is subjected to the honorarium limitations of 2 U.S.C. § 441i which is administered by the FEC, it is entirely possible that Senator McClure could, if the circumstances so warranted, seek judicial review of an FEC complaint against Judge Mikva if he accepted excessive honoraria, and vice-versa.

All of these statutes, including the one in issue, provide for "private attorneys general" to vindicate the public interest. In *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943), the court recognized the standing of an association of coal consuming businesses to challenge an order of the Secretary of Interior "to vindicate the public interest involved in a violation of the Act . . . even if he can show no past or threatened invasion of any private legally protected substantive interest of his own." *Id.* at 705. *See also, Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

In this case, the fact that the jurisdictional statute in question limits its use to a certain category of groups or individuals [as does the FECA in 2 U.S.C. § 437h or 26 U.S.C. § 9011(b)] does not diminish the ability of such person to bring the action. Indeed, considering past statements of judicial concern in suits similar to the one at bar that Congress has been silent on the subject matter of the lawsuit, the specific and narrow jurisdictional statute in this case militates in favor, not against, the grant of standing to Senator McClure. *See, Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Justice Powell, concurring on ripeness grounds).

Amicus submits that the jurisdictional statute in question operates to vindicate larger public interest issues than the other citizen suit statutes cited *supra*. Those statutes provide for the judicial interpretation and enforcement of laws passed by Congress. The statute in question, however, provides for judicial interpretation and enforcement of a specific provision of the constitution, the supreme law of the land to which all laws must conform. Article VI, Clause 2.

While *amicus* recognizes that the Congress cannot override the "case or controversy" clause of Article III, the facts of this case clearly do not present a mere hypothetical question to the court for an advisory opinion.

Indeed, the court below even recognized that "we are *not* asked for an advisory opinion." (App. 7a, n. 6) (Emphasis added). The controversy over the constitutionality of Judge Mikva's appointment to the court is a live one which the court can resolve using standard judicial principles for interpreting constitutional provisions.

II. The Separation of Powers Doctrine Does Not Warrant Dismissal of This Case

The three-judge panel held that not only did Senator McClure not have standing, but suggested, without citing any authority, that dismissal was warranted under separation of power considerations. The Court below reasoned in part that "[t]he fact that the statute makes Senators and members of the House, and no others, "enforcers" of the Constitution in the judicial forum implicates specail concerns regarding the separation of powers." (App. 6a). The Court also stated that "the vice of the statute before us is its muddling of the roles, its blurring of the lines between the branches of government." (App. 12a).

Amicus submits that the case is not nonjusticiable merely because the class of "private attorneys general" is limited. Under its strange reasoning, the Court below would apparently have no problem of justiciability if the statute in question were broadly worded and provided for a suit by "any citizen" similar to the Clean Air Act and other such statutes. *Amicus* submits, however, that the virtue of this statute rather than its "vice" is the very fact that it is so limited to the narrow class of individuals whose constitutional prerogatives are implicated by the appointment of an ineligible individual to the federal bench.

As previously noted, certain provisions of the Federal Election Campaign Act similarly limit the possible class of plaintiffs to those who have a special interest in federal

elections rather than to "any person". *See* 2 U.S.C § 437h; 26 U.S.C. § 9011. If 2 U.S.C. § 437h allowed then Senator James L. Buckley the right to a judicial determination as to whether the FEC Commissioners were constitutionally appointed in a manner prescribed by Article II, Section 2, Clause 2, *amicus* submits that Senator James A. McClure has a similar right under Public Law 96-86 to determine whether Judge Mikva was constitutionally appointed under Article II in light of the ineligibility Clause of Art. I, Section 6. *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976).

As another reason to justify its refusal to hear Senator McClure's case, the lower court stated:

> Under the Constitution, it was the duty of Congress itself, in the first instance, to determine Judge Mikva's qualifications both on the merits and on the issue of whether he was constitutionally eligible to serve as a judge. To allow members of Congress to change hats, as it were, to plead the unconstitutionality of their own acts before this court on the basis of an argument already debated in the Senate but lost there by vote, would, we suggest, set a dangerous precedent.

App. 13a.

Amicus believes that this articulated concern is without merit. Surely under the Constitution, the Congress itself also has the duty to enact laws, and in so doing considers in many cases the constitutionality of those laws. Yet this Court has never refrained from striking down certain of those laws as unconstitutional merely because the constitution gives the Congress the exclusive power to enact them in the first instance. *Amicus* submits that the judicial review function should be the same whether the Court is passing on the constitutionality of laws approved by the Congress, treaties approved by two-thirds of the Senate, or judges approved by a majority of the Senate.

The lower court thus mistakenly focuses upon the identity of the plaintiff in this case rather than the issue to be litigated.

Finally, it is important to note that the very passage of the jurisdictional statute in question by the Legislative and Executive branch evinces a belief by these two branches that a judicial resolution of this dispute would not, and should not, be viewed as an inappropriate invasion by the judiciary on the powers of the other branches of government. *Baker v. Carr*, 369 U.S. 186, 217 (1966); *Powell v. McCormack*, 395 U.S. 486 (1969).

CONCLUSION

Amicus submits that the District Court for the District of Idaho erroneously concluded that it lacked jurisdiction to hear this constitutional case. This action is a "case or controversy" under Article III in that Senator McClure has standing to prosecute this action and its resolution by the judiciary would not violate the separation of powers doctrine.

Respectfully submitted,

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